No. 81809-6

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAULT INDIAN NATION; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; TULALIP TRIBES, federally recognized Indian tribes, JOAN BURLINGAME; LEE BERNHEISEL; SCOTT CORNELIUS; PETER KNUTSON; PUGET SOUND HARVESTERS; WASHINGTON ENVIRONMENTAL COUNCIL; SIERRA CLUB; and THE CENTER FOR ENVIRONMENTAL LAW AND POLICY,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, Governor of the State of Washington; WASHINGTON DEPARTMENT OF ECOLOGY; JAY MANNING, Director of the Washington Department of Ecology; WASHINGTON DEPARTMENT OF HEALTH; and MARY SELECKY, Secretary of Health of the State of Washington,

Appellants/Cross-Respondents,

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Appellants/Cross-Respondents.

RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT WASHINGTON WATER UTILITIES COUNCIL

Attorneys for Appellant
Washington Water Utilities
Council:

Adam W. Gravley, WSBA #20343
Tadas Kisielius, WSBA #28734
GORDONDERR LLP
2025 First Avenue, Suite 500
Seattle, Washington 98121-3140
Telephone: (206) 382-9540
Facsimile: (206) 626-0675

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I. INTRODUCTION

The 2003 Municipal Water Law[1] ("MWL") is significant legislation that regulates the rights and obligations of water utilities that provide water to most of the state's growing population. CP 1075. The MWL is the Legislature's policy choice for balancing resource conservation and drinking water needs. The MWL imposes obligations on public water systems that are subject to the law, including conservation and efficiency standards and requirements to serve customers in a given service area (codifying and bolstering the common law duty to serve). The MWL provides certainty and flexibility in the administration of municipal water rights by clarifying ambiguities in prior law, resolving policy questions remaining after *Theodoratus*, and changing certain administrative procedures.

Several years after the MWL's enactment, Plaintiffs[2] strategically bring a facial constitutional challenge, invoking a rare and disfavored judicial remedy. Plaintiffs advance vague and shifting allegations of

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[1] Laws of 2003, 1st Spec. Sess., ch. 5. A copy of the enacted session law is attached hereto as Appendix A. Throughout the brief we refer to the provisions of the MWL by their section number in the session law. The MWL as a whole is important to this case, not just the provisions that Plaintiffs isolate. *See* III.D.1, *infra*.

[2] We refer to Respondents/Cross-Appellants, collectively as Plaintiffs, their designation below. We refer to Plaintiffs Joan Burlingame, *et al.*, as "Burlingame." We refer to Plaintiffs Lummi Indian Nation, *et al.*, collectively, as "Tribes."

harm to an undefined class of rights that are not directly governed by the MWL. Because their introduced evidence of harm was discredited and rebutted (and is irrelevant to a facial challenge), Plaintiffs ask this Court to assume impairment as a matter of law and that the Legislature intended to violate the Constitution. Because they cannot satisfy the exacting standards of a facial challenge, Plaintiffs want to be excused from them. They argue for lower, subjective, and unworkable standards of review and tests for separation of powers and due process. Plaintiffs assert an unfounded legal right to diminish or eliminate municipal rights in favor of instream flows. Plaintiffs' facial constitutional claims plainly fail on all elements, and the Court should not accept the argument that Plaintiffs should be held to a lower burden than other litigants. Although Plaintiffs argue that a facial challenge is their only recourse, Plaintiffs may pursue their impairment and title claims in any number of private legal actions (*e.g.*, as-applied challenge, quiet title action, etc.) or under the statutory procedure for a general adjudication.

Ultimately, Plaintiffs invite the Court to step beyond its constitutional role and overrule the Legislature's policy choice. The Plaintiffs' challenge is based on policy grievances, rather than western water law or constitutional principles. The Court should reject Plaintiffs' invitation to substitute Plaintiffs' policy choice for the Legislature's in

curing unclear law and exercising the State's police power.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

WWUC incorporates the State's restatement of issues pertaining to Plaintiffs' assignments of error in part II of the State's Reply Brief. Additionally, WWUC adds the following issues:

1. In bringing their action on behalf of an undefined group of junior water rights that are not directly governed by the MWL (including instream flows and "the water rights of all Washington citizens") have Plaintiffs sufficiently (a) identified vested rights that are entitled to protection under the due process clause, and (b) established deprivation of such rights by the MWL?

2. Does section 5(2) of the MWL, codified at RCW 90.03.386(2), operate prospectively where it changes place of use only after future adoption and approval of a water system plan that complies with the conservation and efficiency measures of the MWL?

III. ARGUMENT

A. Standard of Review and Burden of Proof.

WWUC incorporates arguments regarding the standard of review and burden of proof as set forth in parts III.A of the State's Reply Brief and III.B.1 of Cascade Water Alliance's Reply Brief. Courts generally disfavor facial challenges. *See* WWUC's Opening Br. at IV.A. Plaintiffs

must meet a high burden before the Court will grant the extraordinary relief requested. *Id.* Plaintiffs must prove that the statute on its face is unconstitutional beyond a reasonable doubt.[3] *Id.* Whenever possible, it is this Court's duty to construe the MWL to uphold its constitutionality. *State v. Browet*, 103 Wn.2d 215, 219, 691 P.2d 571 (1984).

B. Separation of Powers.

Plaintiffs argue for an overly strict interpretation of the separation of powers doctrine that is inconsistent with decisions of this Court and that would interfere with the Legislature's exercise of functions clearly within its sphere of authority. Plaintiffs also presume an unconstitutional intent on the Legislature's part and seek to flip the presumption of a statute's constitutionality.

1. The MWL Does Not Violate the Separation of Powers Doctrine Because the Legislature Did Not Overturn *Theodoratus* and Acted Wholly Within Its Sphere of Authority to Make Policy.

This Court recently clarified the separation of powers doctrine as it applies to retroactive amendments to statutes that have been previously construed by the Court. *Hale v. Wellpinit School Dist.*, ___ Wn.2d ___,

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[3] *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220-21, 5 P.3d 691 (2000) (facial challenge focuses on "whether the statute's language violates the constitution, not whether the statute would be unconstitutional 'as applied' to the facts of a particular case."); *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989) ("the factual setting of this case is *irrelevant*") (emphasis added).

198 P.3d 1021 (2009). The fundamental inquiry in a separation of powers challenge is "whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Id.* at 1027. *Hale* rejects Plaintiffs' contention that any retroactive statute that contravenes a prior determination of this Court violates the separation of powers doctrine. *Id.* at 1029, n.6. Under *Hale*, the Court must reject the Plaintiffs' separation of powers claims because section 6(3), the pumps and pipes certificate provision codified at RCW 90.03.330 (3), and sections 1(3) and (4), the definitions codified at RCW 90.03.015, do not overturn *Dep't of Ecology ("Ecology") v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). *See* App. A at 1-2, 6. The Legislature acted wholly within its sphere of authority in resolving policy issues without threatening the independence of the judiciary.

a. Separation of powers inquiry in light of *Hale*.

Hale addressed an employee's lawsuit against his employer for disability discrimination under the Washington Law Against Discrimination ("WLAD"). The case turned on whether the employee was "disabled." The WLAD, at time of conduct, did not include a definition of disability. The Court had previously interpreted the term in *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000), and six years later adopted a different, more restrictive interpretation in

McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). In response to *McClarty* the Legislature adopted a amendment that rejected the Court's 2006 interpretation and retroactively broadened the definition of "disability." The Legislature's enactment clearly retroactively contravened this Court's 2006 decision in *McClarty*. Although the *McClarty* interpretation is deemed to be written into the act and apply to conduct and causes of action that predate the decision, *Hale*, 198 P.3d at 1028-29, the retroactive legislative amendment by its very terms applies to all causes of action prior to *McClarty*. *Id.* at 1023. The amendment did not apply between the date of the *McClarty* decision and adoption of the amendment so as not to reverse the outcome in *McClarty* and to provide a safe harbor to employers who had changed their conduct to adapt to *McClarty*.

The employer challenged the retroactive amendment on separation of powers grounds. This Court upheld the retroactive amendment, despite the fact that it retroactively rejects *McClarty*. The Court reasoned that the Legislature did not reverse the outcome in *McClarty* and had not "threatened the independence or integrity or invaded the prerogatives of the judicial branch." *Id.* at 1028. *Hale* brings Washington in line with federal separation of powers jurisprudence, which recognizes Congress's clear authority to amend a statute retroactively to correct a court's prior

interpretation of a statute and strikes retroactive legislation on separation of powers grounds when the legislation sets aside a prior court decision.[4]

b. The MWL does not reverse *Theodoratus*.

As in *Hale*, section 6(3) and sections 1(3) and (4) do not reverse or change the outcome in *Theodoratus*. In *Theodoratus* a holder of a water right permit that had not yet been perfected and for which no certificate had been issued sought an extension of time to develop the water right, including constructing the water delivery system and putting the water to full beneficial use. 135 Wn.2d at 588. Ecology granted the extension but removed a condition that would have allowed perfection upon completion of construction of the water system. *Id.* Ecology imposed a new condition that perfection of the right and issuance of the certificate would occur only upon actual beneficial use. *Id.* The permit holder appealed and argued that the new condition was inconsistent with Ecology's past policy of issuing certificates on the basis of system capacity. This Court determined that the past administrative practice or policy of issuing certificates on the basis of system capacity was invalid and that Ecology's permit condition was therefore lawful. *Id.* At 598.

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[4] *See Rivers v. Roadway Express*, 511 U.S. 298, 313, 114 S. Ct.1510, 128 L. Ed. 2d 274 (1994); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 240, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

Section 6(4) of the MWL, codified at RCW 90.03.330 (4), confirms the Court's primary holding in *Theodoratus* that beneficial use is the only method of perfection of existing and future permits. *See* App. A at 7. The right at issue in *Theodoratus* was a permit. Therefore section 6(4) would govern the *Theodoratus* permit and, consistent with the Court's decision, would require actual beneficial use for perfection.

Contrary to Plaintiffs' assertion, section 6(3) does not overrule *Theodoratus*. Section 6(3) applies to the thousands of certificates that had already been issued prior to *Theodoratus* on the basis of system capacity ("pumps and pipes" certificates) upon which public water systems were relying to serve future growth. CP 1555-56, 1634, 1601. The Court in *Theodoratus* appropriately did not address these certificates. Section 6(3) confirms that these previously issued pumps and pipes certificates are unchanged by *Theodoratus* and remain rights in "good standing," whose inchoate quantities are subject to reasonable diligence requirements.[5] The *Theodoratus* water right was not a pumps and pipes

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[5] The phrase "in good standing" is a clear reference to the definition of inchoate rights quoted in *Theodoratus*, 135 Wn.2d at 596 (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)). In order to create a potential constitutional conflict, Plaintiffs ignore this reference to inchoate quantities and contend that section 6(3) has a broader effect, resulting in the automatic perfection of these inchoate quantities. WWUC responds to plaintiffs' mischaracterization in part III.B.2, *infra*.

certificate of the type that is governed by Section 6(3).

Similarly, a retroactive characterization of the *Theodoratus* permit as a right for municipal water supply purposes or of the permit holder as a municipal water supplier under sections 1(3) and (4) does not change the outcome in *Theodoratus*. While a statutory exemption from relinquishment exists for rights claimed for municipal water supply purposes,[6] the extent and validity of the *Theodoratus* water right permit, including whether it had been relinquished or exempt from relinquishment, was not at issue in *Theodoratus*. Nor could it have been. Issues pertaining to relinquishment or exemptions from relinquishment are irrelevant to permits like the one in *Theodoratus* because water rights are not subject to relinquishment until after they have been perfected.[7] RCW 90.14.150. *See PUD No. 1 of Pend Oreille County v. Dep't of*

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[6] The definitions in sections 1(3) and (4) are used throughout the MWL. In and of themselves, sections 1(3) and (4) have no operation, either prospective or retroactive. Instead, whether they are prospective or retroactive depends on how they are applied in the Water Code. Contrary to the Tribes' suggestion, Tribes Br. At 51, WWUC did not "overlook" the different uses of the definitions, but have focused on the use of the definitions that Plaintiffs' claim are unconstitutional. In their separation of powers challenges, the Plaintiffs focus on Section 6(3) which uses the phrase "municipal water supply purposes." Plaintiffs only remaining allegation regarding separation of powers is the definitions' alleged retroactive application as an exemption from relinquishment in RCW 90.14.140.

[7] Plaintiffs succeeded in obfuscating this issue below, where the superior court indicated that Theodoratus "has retroactively had his pumps and pipe certificates reinstated as a municipal water supplier." RP 12. In fact, the right in *Theodoratus* was a permit, not a certificate, and therefore is not subject to relinquishment.

Ecology, 146 Wn.2d 778, 803, 51 P.3d 744 (2002). Therefore, the question of whether the MWL would now characterize the *Theodoratus* permit as a permit for municipal water supply purposes has no impact on the outcome of the *Theodoratus* decision because section 6(4) of the MWL requires actual beneficial use for all existing permits.

Theodoratus did not definitively construe the term "municipal water supply purposes" and its discussion of the phrase was, at best, *dicta*. *See* part III.C.3, *infra*. By contrast, the Legislature's definition of disability at issue in *Hale* was directly at odds with the Court's prior construction of the term in *McClarty*, yet it survived the separation of powers challenge. Accordingly, Plaintiffs' challenge to the definitions fails.[8] Even if the Court had construed municipal water supply purposes in *Theodoratus* and assuming even that the definitions in the MWL contravene the Court's construction, *Hale* makes it clear that such a reformulation of the definitions does not violate the separation of powers

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[8] Even if the Court disagrees and determines that sections 1(3) and (4) violate separation of powers, the appropriate remedy is to give the sections prospective application so they would only apply to facts that occurred after the date of adoption of the MWL. WWUC Opening Br. at V.C.1. Burlingame seeks to brush off the constitutional prospective application of the definitions in sections 1(3) and 1(4) by arguing that "[i]t does not matter whether certain portions of the MWL can be applied prospectively. It is never constitutional for the legislature to seek to be the court of last resort, whether in whole or in part." Burlingame Br. at 18. Plaintiffs do not cite to any authority for this extraordinary statement. Plaintiffs' position is inconsistent with the principle that the Court is bound to adopt a reasonable constitutional interpretation, if necessary, (including one that applies prospectively). WWUC Opening Br. at V.C.1.

unless the definitions reverse *Theodoratus* so as to change the outcome of the decision.[9]

Finally, while the MWL does not include a "safe harbor" provision as did the amendment in *Hale* during which the law was not in effect, there is no need for one because the outcome of *Theodoratus* remains unchanged following adoption of the MWL. In *Hale*, had there been no safe harbor provision, the retroactive amendment could arguably overturn the Court's decision in *McClarty*. By contrast, none of the sections in the MWL would change the outcome in *Theodoratus*. Indeed, MWL section 6(4) codifies *Theodoratus* by requiring actual beneficial use as the standard for perfecting a permit.

c. The Court and the Legislature acted within their spheres of authority and in reciprocal deference to each other's role.

Hale emphasizes the reciprocal nature of the separation of powers doctrine, noting that it requires "cooperation and flexibility among the branches" and that "each must act with a spirit of interdependence." 198 P.3d at 1027. The Court evaluated its relationship with the Legislature regarding the WLAD and described it as "a model of how two separate and independent branches of government can work together in harmony

[9] Unlike the legislation in *Hale*, MWL sections 6(3) and 1(3), (4) do not even contravene this Court's decision in *Theodoratus*. *See* WWUC Opening Br. at V.B.2, V.C.2.

and in the spirit of reciprocal deference to the other's important role and function in the art of governing." *Id* at 1028-29. Similarly, the Court's and Legislature's exercise of their constitutional powers with respect to municipal water rights that culminated in the MWL is another example of working together in reciprocal deference.

In *Theodoratus,* the Court first made a decision addressing perfection of a permit in the context of an appeal of conditions imposed on the permit. The Court's decision was limited to the case and controversy presented for review. The Court determined that the *Theodoratus* permit could only be perfected through actual beneficial use and that Ecology's policy of issuing certificates on the basis of system capacity unlawful. The Court did not offer an advisory opinion on the validity of thousands of previously issued pumps and pipes certificates and expressly declined to address issues pertaining to municipal water suppliers in the context of the case.

Though the decision was limited, *Theodoratus* left policy questions in its wake as to whether and how the decision should be extrapolated to previously issued pumps and pipes certificates. In the years immediately following *Theodoratus,* Ecology sought to resolve those policy questions, most notably through its controversial draft Policy 1250. Draft Policy 1250 cast a cloud of uncertainty that lingered even

after Ecology abandoned it. *See* WWUC's Opening Br. at 13-15; CP 1789, 1714-15, 1719-24.

In this context the Legislature stepped in to resolve the remaining policy questions regarding previously issued pumps and pipes certificates. Sections 6(2) and 6(3) reject Ecology's reasoning and approach in draft Policy 1250.[10] Section 6(2), codified at RCW 90.03.330 (2), prevents Ecology from rescinding or diminishing previously issued pumps and pipes certificates (as was contemplated in draft Policy 1250) except in certain circumstances. Significantly, the Legislature restricted only Ecology's, and not the judiciary's, authority in section 6(2). Similarly, Section 6(3) directly rejects Ecology's assumption in draft Policy 1250 that *Theodoratus* changed the status of existing pumps and pipes certificates and confirms that they are rights in good standing. Thus, section 6(3) addresses the issue that the Court in *Theodoratus* properly declined to address but reaches a different policy conclusion than Ecology's proposed draft Policy 1250.[11] The Legislature recognized a

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[10] This response to correct or limit an administrative policy is clearly within the Legislature's power. *Port of Seattle v. Pollution Control Hearings Bd. ("PCHB")*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (the Legislature may clarify a law in response to an administrative adjudication); *Hale*, 198 P.3d at 1028 (it is within the Legislature's "sphere of authority to make policy, to pass laws, and to amend laws already in effect.")

[11] In light of the direction Ecology had proposed it is therefore not superfluous, as Plaintiffs contend, for the Legislature to confirm that the rights had not fallen out of good standing. *See* Tribes' Brief at 28, 20 n.9; Burlingame Brief at 59, 65.

new kind of certificate (one that may include inchoate quantities that must still be perfected) in order to resolve the lingering policy questions. The Legislature was acting within its authority to set such a policy.

Similarly, sections 1(3) and (4) are an example of reciprocal deference. The Court did not construe the phrase municipal water supply purposes as that phrase is used in RCW 90.14.140 because relinquishment was not at issue in the case. *See* III.C.3, *infra.* The Court's indication that the water right holder was not a "municipality" may have revitalized a debate regarding the interpretation of the phrase "municipal water supply purposes" but the Court's indication, by itself, did not amount to an interpretation of "municipal water supply purposes." Accordingly, the Legislature appropriately stepped in to resolve the ambiguity and uncertainty by adopting, for the first time, a definition for the phrase, without overturning the Court's decision.

Therefore, the MWL does not violate separation of powers. The MWL, principally section 6(4), preserves the Court's decision in *Theodoratus.* The adoption of 6(3) pertaining to previously issued pumps and pipes certificates as well as the definitions of municipal water supplier and municipal water supply purposes in sections 1(3) and 1(4) are clearly within the Legislature's sphere of authority to make policy, to pass laws, and to amend laws already in effect. Plaintiffs prefer the path

proposed by draft Policy 1250 and argue that it is a necessary legal consequence of *Theodoratus*. *See* Burlingame Br. at 47. Plaintiffs' policy preference for a different outcome does not give rise to a constitutional defect because the MWL does not threaten the independence or integrity or invade the prerogatives of the judicial branch. Especially in light of the exacting standards of review and burden of proof, Plaintiffs' facial challenge fails.

2. Section 6(3), the Pumps and Pipes Provision, Is Not An Improper Legislative Determination.

Plaintiffs' additional argument that section 6(3), RCW 90.03.330 (3), constitutes an improper legislative determination of adjudicative facts fails for several reasons. The cases upon which Plaintiffs rely suggest that the separation of powers doctrine prohibits the Legislature from invading the prerogatives of the judicial branch by reaching factual conclusions in specific cases but recognize that the Legislature may pass a facially neutral law for the court to apply to the facts before it.

This line of cases stems from an hoary decision of the U.S. Supreme Court in *U.S. v. Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1872), the holding of which this Court indicated "has been severely limited." In its opening brief, WWUC distinguished and marginalized *Klein* as well as the other cases upon which Plaintiffs rely. WWUC Br. at

32-35. In their response, Plaintiffs have not responded to those legal arguments and thus concede them.

These cases largely address legislation that is designed to change the outcome in a pending adjudicative proceeding. *See Port of Seattle*, 151 Wn.2d at 624-25; *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 209-10, 972 P.2d 179, 194 (1999). Unlike the factual situations in those cases, the Legislature adopted the MWL outside of any pending litigation or adjudication.

More importantly, the MWL does not violate the principle articulated in those cases because section 6(3) does not make case by case applications of the law to particular facts. The MWL is distinct from the legislation addressed in *O'Brien,* which discharged specific obligations in certain contracts due to a factual finding of economic impossibility. *Tacoma v. O'Brien*, 85 Wn.2d 266, 272, 534 P.2d 114 (1975). Section 6(3) does not make determinations regarding the validity or extent of any particular water rights. Instead, the indication that previously issued pumps and pipes certificates are "rights in good standing" simply acknowledges that the rights may have inchoate quantities that are still subject to the requirements of due diligence. *See* WWUC's Opening Br. at V.B.3. The reference is to the definition of inchoate rights quoted in *Theodoratus*, which indicates that an inchoate right is "an appropriative

right in good standing." *Theodoratus*, 135 Wn.2d at 596.

Section 6(3) is a clear policy directive that rejects the path of Ecology's draft Policy 1250. Beyond the broad policy directive, there is no indication that the Legislature intended to constrain courts in the context of adjudications or other court actions from determining whether those previously issued water rights certificates have been exercised with reasonable diligence or from otherwise evaluating the extent or validity of any of these previously issued certificates. To the contrary, the Legislature intended the MWL to work in concert with water rights adjudications, the primary mechanism according to which courts make a factual determination of the extent and validity of a water right. Specifically, section 6(2) authorizes Ecology to revoke or diminish a previously issued pumps and pipes certificate in order to implement the outcome of a water rights adjudication consistent with RCW 90.03.240. Accordingly, section 6 works in concert with and does not constrain the judiciary. Had the Legislature intended section 6(3) to have the effect Plaintiffs construe of effectively adjudicating previously issued certificates, the grant of authority in section 6(2) would be meaningless because previously issued pumps and pipes certificates would not ever be revoked or diminished in an adjudication.

Plaintiffs essentially argue that the Legislature did not go far

enough in referencing the definition of inchoate rights. Plaintiffs observe that the Legislature did not include reference to the entire definition of inchoate rights quoted in *Theodoratus,* including the sentence that an inchoate right "remains in good standing so long as the requirements of law are being fulfilled."[12] Plaintiffs argue that this omission indicates legislative intent to excuse pumps and pipes certificates from compliance with "requirements of law" including reasonable diligence. The Court should reject this strained statutory interpretation. The failure to spell out all the laws to which a right is subject does not indicate an intent to excuse the right from compliance with those laws. The term "in good standing" is a term of art and a clear reference to the quoted description of inchoate rights in *Theodoratus* including the requirement that the right be developed with reasonable diligence. *See, e.g.*, RCW 90.03.460 (nothing in Ch. 90.03 RCW shall impair "any inchoate right...being prosecuted with reasonable diligence").

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[12]The entire quoted passage in *Theodoratus* indicates that an inchoate right is:

> an incomplete appropriative right in good standing. It comes into being as the first step provided by law for acquiring an appropriative right is taken. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law.

Theodoratus, 135 Wn.2d at 596.

In furtherance of their argument that 6(3) excuses reasonable diligence, Plaintiffs create the specter of a entire class of rights that have not been developed with reasonable diligence. A facial constitutional challenge cannot be based on such a speculative and unsubstantiated fear. In fact, by definition, holders of pumps and pipes certificates have completed many aspects of reasonable diligence. There are several phases involved in the development of a water right: initiating the construction of the delivery system and withdrawal/diversion works, completing construction and putting the water to beneficial use. *See* RCW 90.03.320, .460. Because pumps and pipes certificates were issued upon completion of construction of a system sufficient to carry the allotted quantity of water, by definition, pumps and pipes certificates have completed the first two steps.[13] Accordingly, all that remains is putting the full quantity to beneficial use. This is dependent upon population growth and is therefore outside the utilities' control. The fear that there is a wholesale lack of reasonable diligence is a red herring. Plaintiffs have failed to satisfy their burden of proving their facial claims under the applicable exacting standards of review.

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[13] Contrary to the Tribes' assertion, inchoate portions cannot be "held indefinitely for speculative purposes." Tribes' Br. at 34, n.15. Holders of these certificates have constructed the system, at significant expense, demonstrating commitment to the development of the rights.

C. Substantive Due Process.

Plaintiffs' substantive due process claims are rooted in the same flawed fundamental premise that drives their separation of powers claims; namely, the purported conflict or inconsistency between the MWL and prior law, including *Theodoratus*. Based on this invented conflict, Plaintiffs argue that the challenged provisions of the MWL retroactively "expanded" municipal rights to the alleged detriment of the undefined class of junior rights and instream flows on whose behalf Plaintiffs bring their claims. Plaintiffs' entire substantive due process theory is vague and speculative. The *Theodoratus* decision is not as broad as Plaintiffs assume nor does the MWL have the effect they invent.

1. All of Plaintiffs' Substantive Due Process Claims Fail Because They Cannot Identify The Rights That Are Harmed Nor Can They Demonstrate Harm Beyond Mere Speculation.

To prevail on their substantive due process claims, Plaintiffs must show that the challenged statutory provisions impair their vested rights. The failure to clearly and persuasively identify the interest allegedly protected by due process is fatal to such a claim. *Washington Federation of State Employees v. State*, 127 Wn.2d 544, 561, 901 P.2d 1028 (1995).

Plaintiffs have not and cannot specify what rights are allegedly deprived. Plaintiffs assert that the law impairs an undefined and

generalized class of "junior rights," "rights of third parties," and minimum instream flow rights, generally. *See* Burlingame Br. at 29; Tribes Br. at 60. Indeed, at one point the Tribes argue on behalf of "the water rights of all Washington citizens."[14] Tribes Br. at 37. In reality, the MWL directly governs only water rights held by municipal water suppliers to which Plaintiffs assert a vested interest. While Burlingame goes so far as to claim ownership of water quantities allocated to municipal water suppliers, Burlingame Br. at 29, Plaintiffs' interest is speculative because it depends on a chain of hypothetical future events, including the elimination or reversion of inchoate water quantities to the State such that the water is available for further appropriation. This mere expectation does not rise to the level of an interest that may receive due process protection:

> A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

Godfrey v. State 84 Wn.2d 959, 963, 530 P.2d 630 (1975) (emphasis added). Plaintiffs do not own or have any title interest in inchoate

[14] However, the Tribes have made clear that their "federal reserved water rights are not at issue in this matter." CP 1031 (Tribes' amended complaint).

municipal quantities. They must pursue such claims in a quiet title action, a general adjudication or other cause of action.

Just as Plaintiffs' alleged interest is remote and speculative, so, too, is the alleged deprivation. Generally, Plaintiffs suggest that the challenged provisions impair a vague class of water rights as a matter of law. For example, Burlingame argues that:

> Water rights are akin to a jigsaw puzzle where to change or expand one piece necessarily diminishes or changes another... The MWL's expansion of a certain favored class of water rights will necessarily change and diminish junior water rights simply by operation of the statutes. This will happen in all instances regardless of the details of the expanded or junior water rights.

Burlingame at 29 (emphasis added).[15]

The case law to which Plaintiffs cite does not support their conjecture. None of the cited Washington cases[16] address facial constitutional challenges. Indeed, the cases involve complicated and detailed assessments of change applications for non-municipal rights that

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[15] At other times, Plaintiffs retreat from their more assertive allegations that the MWL will necessarily harm the unspecified class of junior rights and concede the speculative nature of the asserted harm. For example, the Tribes indicate that the changes "have the potential to adversely affect other existing rights," Tribes at 10 n.4, or "can affect the rights of third parties," *id.* at 59. Similarly, Burlingame acknowledges that the changes "can" result in alleged harm or that "the legislature transformed unperfected rights that may have lost their status to junior rights." Burlingame Br. at 11, 59.

[16] Tribes also cite to *San Carlos* and *Fremont Madison*. WWUC distinguishes these authorities separately in part III.C.2, *infra*.

require extensive factual review and analysis to assess the legality of the proposed change. None stands for the proposition that changes as a matter of law will impair junior rights.[17] At best, the Plaintiffs' cases stand for the proposition that changes to a water right *may* impact or impair other rights. *See* 2 Robert E. Beck, Waters and Water Rights at §17.02 (1991 ed. and 2008 Repl. Vol.) (allegations of interference with water rights by other appropriators "raise fact questions in every case"). However, they cannot satisfy Plaintiffs' burden of proving that the challenged provisions, themselves, will impair the undefined class of rights "in all instances regardless of the details of the expanded or junior water rights" as Plaintiffs allege.

Additionally, Plaintiffs' speculative allegations of harm ignore the balanced approach of the statute as a whole. The Court should reject Plaintiffs' myopic construction and look to the entirety of the MWL in determining its meaning, measuring its alleged impact, and weighing its

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[17] For example, in *R.D. Merrill v. PCHB,* the Court noted that changes in season of use might have third party effects, but the Court ultimately affirmed the proposed change to the water right in question. 137 Wn.2d 118, 128-29, 969 P.2d 458 (1999). Similarly, the specific sentence to which the Tribes cite from *Okanogan Wilderness League, Inc. v. Twisp ("OWL")* suggests that changes, generally, "could" affect natural and return flows, but the decision does not turn on impairment. 133 Wn.2d 769, 777, 947 P.2d 732 (1997). Instead, *OWL* determines that the right at issue was abandoned.

constitutionality.[18] Plaintiffs have isolated MWL provisions regarding certainty and flexibility in the administration of municipal water rights thereby distorting the MWL's effect. Plaintiffs ignore all of the provisions in the MWL that require municipal water suppliers to adopt water conservation measures intended to reduce overall consumption:

- The MWL declares "the intent of the legislature that the department [of health] establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability." Section 7(1), RCW 70.119A.180(1). App. A at 7.
- Municipal water suppliers must adopt water conservation measures as part of water system plans and integrate conservation with water system operation and management. Section 5(3), RCW 90.03.386(3); Section 7(4), RCW 70.119A.180(4)(a). App. A at 5, 7-9.
- A schedule must be adopted for implementing the conservation program. Section 7(4)(c), RCW 70.119.180 (4)(c)(ii). App. A at 8-9.

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[18] *Dep't of Ecology v. Campbell & Gwinn,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (when construing provisions of water code exempting from permit requirements certain domestic wells, Court clarifies principles of statutory construction)). *See also Burns v. City of Seattle,* 161 Wn.2d 129, 146, 164 P.3d 475 (2007) ("The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.").

- Municipal water suppliers must comply with water distribution leakage standards adopted by DOH that ensure reduction of water system leakage rates or are maintaining water distribution systems in a condition consistent with leakage rates adopted by DOH. Section 7(4)(b), RCW 70.119.180(4)(b). App. A at 8.
- Municipal water suppliers must adopt (in an open public forum) water conservation goals. Section 7(4)(c), RCW 70.119.180(4)(c). They must also adopt a reporting system for regular reviews of their progress toward their goals. *Id.* In the event that a system does not meet its goals, it must develop a plan for modifying its program. *Id.*
- DOH facilitates the conservation efforts of municipal water suppliers by adopting regulations that identify how to fund and implement conservation activities. Section 7(4)(a), RCW 70.119.180(4)(a).
- The MWL facilitates environmental efforts of municipal water suppliers by expanding the types of uses considered to be "beneficial uses" to include uses "that benefit fish and wildlife, water quality or other instream resources" and "uses that are needed to implement environmental obligations" under watershed plans, habitat conservation plans, hydropower licenses, or comprehensive irrigation district management plans. Section 2, RCW 90.03.550. App. A at 2.

- Finally, to encourage the implementation of additional conservation measures prior to use of additional inchoate quantities, municipal water suppliers must evaluate as part of their water system plan updates, the "projected effects of delaying the use of existing inchoate rights... through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use." Section 5(3), RCW 90.03.386(3).

In alleging harm of greater water consumption due to the various challenged MWL provisions, Plaintiffs completely ignore these simultaneous requirements for conservation and efficiency.[19] Indeed, with increased conservation and efficiency measures, consumption of water can decrease even as connections and service area grow. CP 1558 (Tacoma's overall water usage declined from 1995 to 2005 because of conservation, despite an 18 percent increase in customer connections). Because the overall use of water is more efficient, changes in water system boundaries and additional connections cannot automatically

[19] Plaintiffs also ignore the role of quantity limitations of water rights that limit the usage of water regardless of the flexibility of other attributes of a water right. Nothing in the MWL allows municipal water suppliers to serve in excess of the limitations on instantaneous and annual water quantities of their water rights, which refutes Plaintiffs' claim that the MWL has expanded municipal water rights.

equate to increased water usage as a matter of law as Plaintiffs posit. The Court should therefore reject Plaintiffs' speculative allegations of harm because they interpret provisions of the MWL out of context and ignore the conservation and efficiency requirements. Plaintiffs cannot satisfy their burden of proving the allegations in their complaints that the provisions of the MWL on their face have "harmed" or impaired their "rights and interests." CP 1039, 600.

Burlingame asks the Court to excuse Plaintiffs from having to demonstrate impairment in any more detailed manner when they state that their undefined facial claims are the only recourse that is available. The Court must reject Plaintiffs' unsupported plea that an as-applied challenge is "impossible."[20] Burlingame Br. at 31. Plaintiffs can always seek an adjudication or file a private lawsuit against a particular water right or

[20] Burlingame also complains that it is "highly unlikely" that junior water rights holders and entities interested in preserving instream flows will know when to file an as-applied challenge. Burlingame Br. at 31. A Westlaw search of the Burlingame plaintiffs yields a multitude of reported cases in which they instituted the action. *See e.g.*, *Cornelius v. Ecology*, PCHB No. 06-099 (2008); *OWL v. Ecology*, PCHB No. 02-074 (2003); *Okanogan Highlands Alliance v. Ecology*, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000); *Center for Environmental Law and Policy ("CELP") v. Ecology*, PCHB No. 00-090 (2000); *OWL v. Ecology*, PCHB No. 98-84 (1999); *Knight v. Ecology*, PCHB Nos. 94-61, 94-77, & 94-80 (1995); *OWL v. Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997); CELP *v. Ecology*, PCHB No. 96-165 (1997); CELP *v. Ecology*, PCHB Nos. 96-204, 96-207 (1996). The various Burlingame plaintiffs are veteran water rights litigators who are highly likely to know when to bring a challenge.

holder that is impairing other rights due to the MWL.[21]

2. Section 6(3) Does Not Retroactively Change the Law or "Expand" Existing Pumps and Pipes Certificates.

The Court should reject Plaintiffs' assertion that Section 6(3), RCW 90.03.330 (3), "expands" municipal rights or impairs an undefined group of junior rights. Plaintiffs claims are based on a mischaracterization of *Theodoratus* and of the operation of Section 6(3).

a. Plaintiffs' claim of deprivation of rights is based on an untenable interpretation of *Theodoratus*.

Plaintiffs' claim that Section 6(3) violates substantive due process is based on their flawed contention that this Court in *Theodoratus* invalidated all of the thousands of certificates that Ecology had previously issued on the basis of system capacity. Plaintiffs read into *Theodoratus* conclusions and holdings that are not present.

In *Theodoratus* the Court was asked to determine whether Ecology exceeded its authority in requiring a permit to be put to beneficial use for perfection. In that context, the Court's indication that

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[21] RCW 90.03.105 - .205 govern adjudications while statutes and common law provide causes of action between private parties for interference with water rights. *See* Beck, *supra* at §17.02 ("Interference with water rights by other appropriators... gives rise to statutory and common law protection..."). *See also, Zannaras v. Bagdad Copper Corp.*, 260 F.2d 575 (9th Cir. 1958); *Irion v. Hyde*, 110 Mont. 570, 105 P.2d 666 (1940); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927); *Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937). *See also Neubert v. Yakima-Tieton Irrig. Dist.*, 117 Wn.2d 232, 814 P.2d 199 (1991).

an administrative policy was invalid is not the same as holding that all previously issued water rights certificates issued on the basis of that policy were also invalid as the Plaintiffs contend. Indeed, the Court deliberately placed outside the scope of its decision water rights held by municipal water suppliers. 135 Wn.2d at 594. At times even the Tribes admit that the case is more limited in its holding and did not invalidate all pumps and pipes certificates. *See* Tribes' Br. at 7 (noting that "the Court did not decide whether a water right held by a municipality could be perfected based on system capacity"); *id.* at 43 (the Court was "leaving open the question of whether the so-called 'growing communities doctrine might apply to water rights held by true 'municipalities'"). While there may have been policy questions in the wake of *Theodoratus* pertaining to those previously issued pumps and pipes certificates, *Theodoratus* did not answer those questions.[22] Instead, the Legislature acted within its authority to make policy and addressed those questions.

Even if this Court agrees that the discussion in *Theodoratus* applies to previously issued pumps and pipes certificates, any such discussion is, at best, dicta. Dicta constitute observations or remarks in

[22] The language from Justice Sanders dissent upon which Plaintiffs rely is not a validation of their interpretation of *Theodoratus*. Rather, his suggestion that the decision "destabilizes" previously issued pumps and pipes certificates is a recognition of the policy questions left in the wake of the Court's decision.

an opinion, "concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination." *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (citing BLACK'S LAW DICTIONARY 541 (4th ed.)). Any extrapolation of the Court's holding to water rights of a type that were not before it can, at best, be considered dicta. Accordingly, Section 6(3) did not retroactively "expand" rights because it did not change the law.

b. Plaintiffs distort section 6(3).

Plaintiffs misinterpret section 6(3), arguing at turns that it: (1) reinstates invalidated rights; or (2) automatically eliminates the beneficial use requirement for unused water rights; or (3) excuses inchoate quantities from reasonable diligence requirements of the law. Plaintiffs argue that all three misinterpretations of 6(3) retroactively "enlarge" pumps and pipes certificates. All of Plaintiffs' interpretations are inconsistent with the plain language of section 6(3) and the related provisions of the MWL.

Plaintiffs' first interpretation that section 6(3) reinstates invalidated rights is flawed because it is based on their erroneous

presumption that *Theodoratus* invalidated the municipal rights.[23] *See* III.C.2.a, *supra.* Under their second interpretation, Plaintiffs posit that Section 6(3) is unconstitutional because it eliminates the beneficial use requirement for municipal rights and perfects any inchoate quantities. To the contrary, the choice of the term "rights in good standing" reflects the inchoate nature of the rights, not a perfected status. Had the Legislature intended the effect Plaintiffs presume, it would have used specific words to indicate perfection. Instead, the Legislature used a specific term of art, "rights in good standing," to refer to the definition of an inchoate right quoted in *Theodoratus*. The Court should give effect to the Legislature's words.

Finally, the Tribes argue that their third interpretation of section 6(3) violates substantive due process because it allegedly excuses those

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[23] In explaining their understanding of the impact of *Theodoratus* and the MWL, Burlingame confuses inchoate status of a right with its priority. The result of Burlingame's confusion is to overstate the impact of the MWL. Burlingame argues that *Theodoratus* "affirmed that junior water rights necessarily 'move up' in priority relative to relinquished rights or unused system capacity, becoming more valuable in the process." Burlingame Brief at 58. Similarly, Burlingame argues that the "Legislature sought to bestow full rights on developers and water rights holders that had not otherwise complied with the law regarding perfection in an attempt to maintain priority of unperfected rights against competing claims." Burlingame Brief at 59. Assuming, *arguendo*, that Plaintiffs interpretation of Theodoratus and the MWL correct, Plaintiffs are plainly wrong that a right's status as perfected or unperfected affects the priority date. An inchoate right holder is allowed to continue to beneficially use unperfected quantities subject to reasonable diligence requirements. If reasonable diligence is exercised, then the right is perfected, but the date of perfection has absolutely no impact on the priority of that right, which relates back to the original date of permit application. RCW 90.03.340.

rights from reasonable diligence. The Tribes' argument is based on the Legislature's purported failure to include the full four sentence definition of inchoate quantities quoted in *Theodoratus*, including the phrase "so long as the requirements of law are being fulfilled." The Court should reject the Tribes' hyper-technical argument that the Legislature's reference to a term of art is somehow insufficient. *See* part III.B.2, *supra.*

Plaintiffs' efforts to navigate between these three alternative interpretations of section 6(3) demonstrate their inconsistent methods of statutory construction. On the one hand, Plaintiffs argue that the use of the term of art "in good standing" is not enough to convey the intended meaning without a verbatim recitation of the entire definition. On the other hand, Plaintiffs would have the Court substitute the word "perfected" for the term of art "in good standing," thereby giving no meaning to the Legislature's words.

The State and WWUC's reasonable and constitutional interpretation of section 6(3) prevails over the Plaintiffs' three straw man interpretations. *Browet*, 103 Wn.2d at 219 ("Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality"). Section 6(3) acknowledges that a water right documented by a pumps and pipes certificate is valid and, in some cases, may include unperfected water appropriations that are fully available for

use by the municipal water supplier. Other references in the MWL to "existing" municipal "inchoate" rights support WWUC's interpretation. *See* Section 5(3), codified at RCW 90.03.386(3), App. A at 5; Section 9, codified at RCW 90.82.048, App. A at 11; Section 10, codified at RCW 90.54.191. If section 6(3) were meant to automatically perfect inchoate portions of pumps and pipes certificates, there would have been no need to adopt these provisions addressing exercise of inchoate quantities of existing pumps and pipes certificates.

The Tribes suggest that if the Legislature had intended the meaning WWUC and the State give to Section 6(3), it should have simply directed Ecology to issue new permits for the inchoate portions of the rights. *See* Tribes' Br. at 20-21. The Tribes appear to assert that the Legislature is restricted in how to document water rights. The Legislature is not so constrained. It has effectively created a unique category of water right certificates to accommodate this Court's holding in *Theodoratus* by recognizing any inchoate portion of the certificates. Creation of this variation of water right certificate is within the police power. Contrary to the Tribes' assertion, this policy choice does not violate substantive due process. The Legislature chose an approach that addresses the documentation of the right, not the nature of the right itself. Plaintiffs have failed to satisfy their burden of proving their facial

substantive due process claim under the relevant and exacting standards of review.

c. Court should reject the Plaintiffs' invitation to rely on inapposite decisions from other jurisdictions.

Plaintiffs analogize the MWL to the statutes addressed by Arizona and Idaho state courts in *San Carlos* and *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996), to summarily conclude that the "MWL affects junior rights holders in Washington in the same manner as the statutes considered by the courts in Arizona and Idaho." Burlingame at 57. In fact, the statutes considered by those courts are distinguishable and the legal principles that led to the conclusions in those cases are unique to those jurisdictions.

San Carlos examined an Arizona statute that is fundamentally different than the MWL. Specifically the Arizona statute was specifically aimed at changing the applicable law mid-stream in an adjudication proceeding that had been ongoing for over twenty years and involved a wholesale and fundamental change in the state's surface water law, creating brand new blanket prohibitions on forfeiture and abandonment and several new exceptions to statutory forfeiture. 972 P.2d at 205, 206. By contrast, the MWL was not intended to impact or change the outcome of decided cases or pending cases. The MWL does not retroactively

carve out new exemptions from relinquishment and instead cures an ambiguity related to an existing exemption.

Additionally, the court's assumption in *San Carlos* that the junior appropriators in the pending adjudication held vested rights to water that might have been forfeited by senior appropriators under the law in effect prior to the 1995 statute was due to a unique aspect of Arizona law. 972 P.2d at 205. Under Arizona law the right to assert a defense vested upon the initiation of a legal proceeding in which the defense could be raised. *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986) (*cited in San Carlos,* 972 P.2d at 205). Accordingly, because an adjudication had been initiated and the challenged law sought to change the rules that the Court had already applied in the pending adjudication, the law impaired the vested rights of the parties to that case. *San Carlos,* 972 P.2d at 205. By contrast, under Washington law, the analysis of whether a statute that impacts pending litigation is constitutional may yield a different result, because, under Washington law, the inquiry is not whether litigation is pending, but, instead, whether an adjudicative body has issued any determinations construing the statute prior to the amendment. *See, e.g., Washington State Farm Bureau v. Gregoire*, 162 Wn.2d 284, 303-06, 174 P.3d 1142 (2007).

Fremont-Madison from Idaho is also distinguishable. First, it

involves a provision unique to the Idaho constitution. 926 P.2d at 1307. It does not involve due process claims nor does it involve an injury to vested rights. And, just like *San Carlos*, it involves a specific water right adjudication and statutes enacted to change the law applicable to that adjudication. *Id.* at 1303-04. Moreover, Plaintiffs seek to import the Court's discussion of the "enlargement" of water rights. However, the term is not synonymous with Plaintiffs' discussion of enlargement. As discussed in *Fremont-Madison* enlargement refers to the use of additional water over and above the amount of water contained in an original water right. *Id.* at 1305. Such an enlargement could occur through "an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id.* *Fremont-Madison* thus involves potential injury to junior appropriators' existing water rights, caused by a quantifiable increase in the senior appropriator's water right. The case at hand, however, involves allegations of injury to junior appropriators based on their theory that they were previously entitled to water that was not fully used by senior appropriators because it might have been relinquished and then reverted to the state and might have eventually been allocated to the junior water right holders. Unlike the junior appropriators in *Fremont-Madison*, plaintiffs here seek not to prevent injury to their existing water rights, but rather to augment their existing

rights by obtaining water currently allocated to senior appropriators. In short, Plaintiffs brazenly assert title to municipal water rights held by utilities across the state. The proper forum for such a claim is an adjudication, quiet title action, or other private action.

3. The Definitions in Sections 1(3) and (4) Do Not Facially Violate Substantive Due Process.

Plaintiffs' claim that the definitions in sections 1(3) and (4), RCW 90.03.015, violate substantive due process is based on their flawed premise that the sections retroactively changed the meaning of the phrase "municipal water supply purposes." Plaintiffs ignore ambiguity in the law prior to the adoption of the MWL and mischaracterize the manner in which the statutory definitions operate. Plaintiffs are unable to satisfy their burden of proving their facial claim under the exacting applicable standards of review.

a. The definitions resolved ambiguity and did not enlarge rights.

Prior to the MWL, the law was unclear regarding what rights qualify for the exemption for rights claimed for municipal water supply purposes.[24] *See* WWUC's Opening Br. at IV.D.2. The previously

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[24] The Tribes incorrectly argue that WWUC's amicus brief filed 11 years ago in *Theodoratus* gives rise to estoppel. Because it was not a party, WWUC was unable to state issues and took a reactive posture. WWUC did not take a clearly inconsistent position. WWUC did not argue whether the term "municipal water supply purposes"

undefined phrase "municipal water supply purposes" was ambiguous on its face because it was either limited to particular legal *entities* or referred to the *function* served by the exercise of the water right, regardless of the legal structure. Evidence of Ecology's historic inconsistent implementation of the phrase demonstrates its ambiguity.[25] The definitions in Sections 1(3) and (4) were designed to resolve the ambiguity and are therefore curative. Because the law was ambiguous before the MWL, Plaintiffs cannot demonstrate that the MWL changed or expanded the law to the detriment of the undefined class of rights on whose behalf they bring their claim. At best, Plaintiffs have an interest in their subjective interpretation of the law as it existed prior to the adoption of the MWL. This interest is not protected by due process. *Godfrey*, 84 Wn.2d at 962-963 ("There is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the

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was clear or ambiguous, nor that private entities are categorically not municipal water suppliers (an undefined term at the time). Contrary to the Tribes' bald assertion, none of the three factors stated in *Arikson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007), is met here.

[25] The Court should reject Plaintiffs' efforts to marginalize the evidence of inconsistent implementation as evidence of "random acts of individual [Ecology] employees." Tribes' Brief at 20. The evidence includes certificates and permits issued over the span of decades to a variety of legal entities. *See* WWUC's Opening Brief at IV.D.2. Additionally, the evidence included opinions of Ecology's water resources program manager and deputy director. CP 1670; CP 1626. *See also* CP 1484-85, 1513-14. This uncontroverted evidence of competing interpretations, examples of which span decades and are from various levels of authority, demonstrate a pattern of inconsistent application that occurred as a direct result of the ambiguity in the undefined term.

omission to legislate on a particular subject.")

The Court should reject the three arguments Plaintiffs offer in support of their contention the law prior to the MWL was clear that the phrase municipal water supply purposes was limited to municipalities. First, the Court should reject Plaintiffs' suggestion that other statutory references to the phrase "municipal water supply purposes" suggested a limited application of the phrase solely to municipalities. The phrase only appeared in the relinquishment exemption at RCW 90.14.140(2)(d) and in RCW 90.03.320, while RCW 90.03.260 used the phrase "municipal water supply."[26] None of the three provisions define or limit the phrase to municipalities. RCW 90.03.320 uses the phrase synonymously with "public water system," suggesting a broad interpretation beyond municipalities.[27] Prior to its amendment by the MWL, RCW 90.03.260 required applications for water rights for municipal water supply to include "the present population to be served, and, as near as may be, the future requirement of the municipality." The use of the term "municipality" in this context indicated that any entity proposing to provide service, regardless of its legal structure, must

[26] Tribes misquote the statutory provision when they indicate that it used the phrase "municipal water supply purposes." Tribes' Br. at 46.

[27] Under Health regulations, a "public water system" includes privately owned water systems. *See, e.g.*, WAC 246-290-020.

estimate the water requirements of the municipality.[28]

Second, the Court should reject Plaintiffs' argument that the plain and ordinary meaning of the phrase municipal water supply purposes is limited to municipalities. *See* Tribes' Br. at 46. Plaintiffs rely on the dictionary definition of "municipal" and suggest that it includes only local governments. *See id.* However, the dictionary definitions of the adjective "municipal" also relate to the function served by the entity. For example, Black's Law Dictionary acknowledges both a "narrower" and a "broader" meaning of the term "municipal," where the broader definition focuses on the function served, regardless of the nature of the entity.[29]

Moreover, even if the Court accepts a more limited interpretation of the dictionary definition of the single term "municipal," the Court should still reach the conclusion that the entire phrase "municipal water supply purposes" has a broader applicability beyond municipalities. Plaintiffs focus solely on one word in the phrase and attempt to divine the

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[28] Notably, while the MWL amended other portions of RCW 90.03.260, it did not meaningfully change or eliminate the phrase upon which Plaintiffs rely. If, as Plaintiffs suggest, the Legislature thought that the use of the term "municipality" in RCW 90.03.260 limited the definition of municipal water supply purposes in a way that is inconsistent with the newly adopted definition of municipal water supply purposes, it could have changed or deleted the reference in RCW 90.03.260. It did not.

[29] BLACK'S LAW DICTIONARY 1016 (6th Ed. 1990). In its "broader sense, [municipal] means *pertaining to the public* or governmental *affairs* of a state or nation *or of a people.*" *Id.* Similarly, MERRIAM-WEBSTERS COLLEGIATE DICTIONARY 720(11th Ed. 2005) defines "municipal" to mean "of, relating to, or characteristic of a municipality [.]" Even the definitions upon which Plaintiffs rely similarly indicate that the adjective "municipal" is "relating" to the city town or local governmental unit.

meaning of the entire phrase through the definition of that one word. When using a dictionary definition, "a court should not apply a mechanical definition but rather should interpret the meaning of terms *in the context of the statute as a whole* and consistently with the intent of the Legislature." *One Pacific Towers Homeowners Assoc. v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) (emphasis added).[30] While each of the individual terms may have accepted definitions, it is the combination of words that suggests broader meaning or creates ambiguity.[31] Thus, the Court cannot ignore the entirety of the phrase when seeking to understand its meaning.

Third, the Court should reject Plaintiffs' contention that *Theodoratus* provides a definitive construction of the phrase "municipal

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[30] This principle is reflected in the doctrine of *noscitur a sociis* "which provides that a single word in a statute should not be read in isolation and that the meaning of the words may be indicated or controlled by those with which they are associated." *State of Washington v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005).

[31] Washington is not alone in distinguishing between the nature of the entity and the function of the service. Idaho's statute defines "municipal purposes" more broadly than "municipality" to include public water supply by corporations and associations. Idaho Code § 42-202B (2008). Utah's statute provides an exemption from relinquishment for nonuse for water rights claimed by "a public water supplier," which includes a public entity, regulated water corporation, community water system, or water users association that "supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use." Utah Code Ann. § 73-1-4 (2008). Arizona's statutes define both "municipal provider" and "municipal use" to include private water companies. Arizona A.R.S. § 45-561 (2008). These statutes grant unique status to public water suppliers based on their purpose, not on their legal form of ownership. Thus, it is not without precedent to define and understand the phrase "municipal water supply purposes" more broadly than the definition of "municipality" or "municipal." The foregoing statutes are attached in Appendix B.

water supply purposes." The Court's statement that the water rights holder in that case is "not a municipality" is not a definitive interpretation of the exemption from relinquishment. Because the case pertained to a permit, relinquishment and exemptions from relinquishment were not at issue. At best, the Court's discussion is dicta because it is not related to the fundamental issue in the case regarding whether Ecology exceeded its authority by imposing a condition on a permit requiring actual beneficial use for perfection. *See Merrill* 137 Wn.2d at 145 (finding that the discussion of the exemption from relinquishment for determined future development in *Sheep Mountain* is dicta because it was not related to the fundamental issue in *Sheep Mountain* regarding due process in relinquishment proceedings).[32]

Therefore, the definitions in sections 1(3) and (4) have not "enlarged" municipal water rights to the detriment of junior water rights. The Court should not protect Plaintiffs' subjective interpretation of the law as it existed prior to the adoption of the MWL.

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[32] Plaintiffs cite to *Georgia Manor Water Ass'n v. Ecology*, PCHB No. 93-68, in support of their interpretation of RCW 90.03.260. However, *Georgia Manor* was overturned on other grounds. CP 2211-16. The superior court reversed the PCHB's finding of relinquishment on the grounds that the non-use of water was not "voluntary." *Id.* Because the court's decision was based on other grounds, its discussion of the municipal exemption is pure dictum. The PCHB decision was reversed. *Georgia Manor* is not precedent and its logic is misguided.

b. The definitions operate only in future proceedings such that they operate prospectively, even when applied to antecedent facts.

Plaintiffs' challenges are based on their retroactive characterization of the definitions in sections 1(3) and (4). In the relinquishment context, sections 1(3) and (4) apply only in proceedings following the adoption of the MWL. Accordingly, they are prospective in nature. Plaintiffs argue that exemptions to relinquishment are nevertheless retroactive because they can be applied in future relinquishment proceedings to facts that predate the adoption of the MWL. Plaintiffs are incorrect because the proceeding at which relinquishment is determined is the "precipitating event" for purposes of determining whether the definitions are retroactive. *See* WWUC's Opening Br. at V.C.3. Plaintiffs argue that the precipitating event should be the date of the non-use of water that is subject to relinquishment, rather than the date of an adjudicative finding of relinquishment.

The Court should reject Plaintiffs' flawed interpretation for three reasons. First, Plaintiffs arbitrarily marginalize established case law that confirms relinquishment under Washington law does not occur until Ecology issues a determination and the water right holder has an opportunity to show sufficient cause by appealing to the PCHB or until a

court reaches a determination in the context of an adjudication.[33]

Second, Plaintiffs rely on certain portions of the relinquishment statute but ignore language in RCW 90.14.130 which confirms that relinquishment occurs *after* an Ecology order and opportunity for appeal to the PCHB, consistent with *Sheep Mountain*. Pursuant to RCW 90.14.130, "[w]hen it appears to the department of ecology" that a person has not used the water right for five consecutive years or more, Ecology issues an order that contains "a statement that unless sufficient cause be shown on appeal the water right *will be declared relinquished.*" (emphasis added). Ecology's order is appealable and "*by itself shall not alter the recipient's right to use water*, if any." *Id.* The Legislature adopted the quoted sentence after the *Sheep Mountain* decision, thereby codifying *Sheep Mountain* and bolstering the conclusion that relinquishment occurs only after Ecology's order and opportunity for appeal. Laws of 1987, c 109 § 13.

Third, the Tribes rely on an Ecology memo dated September 13,

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[33] *Motley-Motley, Inc. v. State of Washington*, 127 Wn. App. 62, 78-80, 110 P.3d 812 (2005) (("relinquishment of Motley's water right did not become effective until PCHB held a hearing and then issued its findings, conclusions, and order"); *Sheep Mountain Cattle Co. v. Dep't of Ecology*, 45 Wn. App. 427, 430-31, 726 P.2d 55 (1986); *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 760-61, 935 P.2d 595 (1997) (issue of whether an exception applies is "a question of fact that is relevant only at the time one asserts relinquishment.").

1983 that preceded *Sheep Mountain* and the amendments to RCW 90.14.130. Though they suggest the memo is evidence of a "long-standing position," Tribes' Br. at 53, the Ecology division of the Attorney General's office took a contrary view in 1990, after *Sheep Mountain* and the amendments to RCW 90.14.130. CP 2566-67 (until a water right holder has an opportunity to appeal a relinquishment order, the "right is not relinquished"). Thus, the Court should reject Plaintiffs' characterization of the timing of relinquishment.

c. Plaintiffs do not contest that the definitions can be applied in future proceedings to facts that occurred after 2003.

To the extent that the Court finds that the application of the definitions to antecedent facts to excuse past non-use is retroactive and unconstitutional, the Court must adopt a prospective application of the definitions to preserve the provision.[34] WWUC's Brief at V.D.1. The

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[34] More generally, the Tribes also oversimplify the relief this Court can grant should it rule in Plaintiffs' favor. The Tribes rely on the MWL's severability clause to assert that the portions of the MWL that were not challenged are unaffected by the outcome of this case. Tribes' Br. at 10, n.5. While a severability provision in a statute is "necessary assurance" that the Legislature intended to salvage constitutional parts of a statute, *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972), a severability clause, alone, is not dispositive, *McGowan v. State*, 148 Wn.2d 278, 294-95, 60 P.3d 67 (2002). Even when there is a severability clause, the Court also examines whether it can "reasonably be believed that the legislature would have passed the one [unchallenged challenged provisions] without the other [provision determined to be unconstitutional], ... or, alternatively, whether the elimination of the unconstitutional portion so destroys the act as to render it incapable of accomplishing the legislative purposes." *Guimont v. Clark*, 121 Wn.2d 586, 613, 854 P.2d 1 (1993).

Plaintiffs do not contest WWUC's argument that definitions in sections 1(3) and (4) could be applied in future proceedings to exempt conduct following 2003 without violating the Constitution. Such a limiting construction would resolve any perceived constitutional infirmities.

d. The Court should not adopt the state's "active compliance" interpretation of section 1(4).

While WWUC and the State essentially concur in all their arguments, WWUC opposes the State's interpretation of the definition of municipal water supply purposes in section 1(4), RCW 90.03.015(4). CP 2609-27. The Court need not adopt the State's interpretation in order to find that section 1(4) is constitutional.

According to the State, section 1(4) requires a holder of a water right to put water to beneficial use in order to qualify for the definition. State Br. at 43. The State's "active compliance" interpretation is based on the language in the definition indicating that a right for municipal water supply purposes is "a beneficial use of water" meeting one of three criteria. The State suggests that the descriptive term "beneficial use of water" imposes an additional obligation in order to qualify for the definition. This illogical interpretation is inconsistent with the plain

language of the statute.[35] Moreover, the State's interpretation would vitiate the exemption from relinquishment, by requiring a holder of a right subject to potential relinquishment to have used water in order to qualify for an exemption from non-use. The Court should uphold the definitions based on the plain language of the statute, in context with other sections of the Water Code and the legislative purpose of the MWL, and without reference to the State's "active compliance" theory.

4. The Legislature Complied with Due Process in Enacting Section 5(2), Pertaining to Place of Use, Because It Is Not Retroactive and Does Not Deprive Plaintiffs of Vested Rights.

Section 5(2), RCW 90.03.386(2), indicates that the place of use of a municipal water supplier's right will include any portion of the water supplier's service area depicted in an approved water system plan. The Court should reject Plaintiffs' claims that Section 5(2) violates substantive due process for two reasons.

First, Plaintiffs' claim is based on their characterization of the provision as retroactive, when, in fact, the provision is prospective.

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[35] The Legislature has frequently used the term "beneficial use" as a descriptive term relating to allowable uses of water resources, as it does in Section 1(4). *See e.g.*, RCW 90.42.040(1); RCW 90.03.345; RCW 90.03.030; RCW 43.99E.010; RCW 90.54.020; RCW 90.66.065(2)(c); RCW 90.03.290. In contrast, when the Legislature intends to require actual water use, the Legislature uses the term "beneficial use" in conjunction with express wording. *See e.g.*, RCW 90.03.320; RCW 90.03.395; RCW 90.14.043; RCW 90.14.010; RCW 90.66.065(3).

Section 5(2) is only applicable if the supplier is "in compliance" with a water system plan, approved by the Department of Health ("DOH"). DOH approval requires new terms that address water conservation measures established by the MWL. *See* Section 7, RCW 70.119.180 (conservation and efficiency provision). App. A at 7-10. *See also* Section 5(3), RCW 90.03.386(3). Therefore, DOH approval of the water system plan (the precipitating event) and all of the factors that DOH considers in issuing an approval occur *after* the adoption of the MWL. Even Burlingame's counterstatement of facts acknowledges the prospective applicability of section 5(2) when they describe its effect. *See* Burlingame Br. at 12 ("Since September 9, 2003, municipal water suppliers intending to change their place of use no longer need" to use the change process pursuant to RCW 90.03.380).

Under Plaintiffs' illogical interpretation of retroactivity, several previous enactments in the water code would be retroactive and violate substantive due process, including the amendments allowing change of water rights (*see* RCW 90.03.380 and RCW 90.44.100) and the relinquishment statute (*see* ch. 90.14 RCW). The Legislature adopted these enactments and applied them to preexisting water rights, even though the enactments allowed changes to the rights that were not part of the "facts and circumstances" in place when many rights were issued.

The Court must reject Plaintiffs' broad and restrictive theory of substantive due process because it would preclude the Legislature from prospectively amending the change process. *Godfrey,* 84 Wn.2d at 962-963 (there is no "vested right in an existing law which precludes its amendment or repeal").

Second, even if section 5(2) is retroactive Plaintiffs' substantive due process claims fail because Plaintiffs' cannot show any deprivation of rights. Plaintiffs' claims are purely speculative. Plaintiffs assume that changes in place of use under Section 5(2) will increase the amount of water used and change the pattern of return flows or aquifer recharge. Tribes' Br. at 59; Burlingame Br. at 11. Plaintiffs ignore the water right's quantity limitations which are unchanged by section 5(2). Plaintiffs' assumption that water use will increase beyond what is permitted in the water right due to changed place of use is based on speculation that the full quantity of a municipal water right would not be used in a less flexible area of usage.

Moreover, the cases to which Plaintiffs cite do not support their speculative claims of impairment. At best, all of the cases Plaintiffs rely on stand for the proposition that a change to a water right *could* affect another water right. They fall far short of supporting Plaintiffs' position that impairment occurs as a matter of law in all cases in which a place of

use change occurs. *See* part III.C.1, *supra.* Plaintiffs' own description of the holdings of these cases belies their more broad claims of impairment as a matter of law. *See* Burlingame Br. at 61 (A water right holder "who changes or expands its place of use can harm other rights...") (emphasis added); Tribes' Br. at 59 ("an expansion in the place of use of a water right can affect the rights of third parties...") (emphasis added). These citations do not demonstrate that impairment to a water right necessarily occurs as a matter of law any time a change in place of use occurs.

Plaintiffs reliance on two cases from Colorado, *Danielson v. Kerbs* and *Farmers Highline Canal Co.*, is particularly misplaced. The agricultural irrigation context addressed in these cases is irrelevant when considering potential impacts of changed place of use of municipal rights. When a farmer diverts water from a stream to water crops in a field, some excess water will return to the stream. Downstream diverters may rely on that "return flow" to contribute to stream levels necessary to take water. *See Danielson v. Kerbs Ag. Inc.*, 646 P.2d 363, 373 (Colo. 1982). If the farmer changes the place of use to a different field with a different point of return, then downstream water uses may be adversely affected. By contrast, in the municipal context, place of use and the point of return

flow are de-linked.[36] Return flow in the municipal water rights context is directed to wastewater treatment plants or to septic treatment systems. CP 2138-39. Wastewater is treated and discharged to either fresh or marine water environments consistent with the terms of State-issued discharge permits, or to groundwater in the case of septic systems. Points of discharges are established and regulated separate from water rights. *See* Ch. 90.48 RCW. Downstream or junior water rights holders do not necessarily have either physical access to or a right to rely on return flow. Therefore, when considering impacts in changed place of use, the distinction between the municipal context and irrigation context is meaningful. Washington law acknowledges this distinction by requiring an additional inquiry when considering changes in place of use of agricultural irrigation rights. RCW 90.03.380. Accordingly, the agricultural irrigation cases upon which Plaintiffs rely are limited to that specific context.

Finally, Burlingame's suggestion that the Legislature adopted the provision out of a nefarious motive to harm junior rights is absurd.

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[36] The case upon which Plaintiffs rely acknowledges that considerations related to place of use are distinct to agricultural irrigation rights. *Id.* at 373 ("The appropriation (to use water for irrigation) must be made in connection with some particular tract of land, and though it be not essential to its continued existence that the application shall be forever confined to the identical land for which the diversion was made...")(emphasis added).

Burlingame Br. At 62. The provision addresses the inefficiencies of the change provisions as they pertain to the place of use of the multiple rights of municipal water suppliers. Municipal water suppliers typically hold multiple water rights to facilitate service responsibilities to growing populations, accommodate demand fluctuations, and ensure certainty and redundancy of supply. CP 1589-94. Each one of the rights in a system's "portfolio" has its own place of use that may be variously described. [37] CP 1590. For example, many rights describe the place of use generally as the "area served by" the utility, or the name of the city and its vicinity while other rights describe the place of use in metes and bounds or references to a specific section, township and range. The service area of water systems changes to respond to the changing boundaries of the growing communities they serve. CP 1559-60. Section 5(2) treats rights of municipal water suppliers as a group. Municipal water suppliers need not change each right in the portfolio to account for every annexation or change to the service area. Section 5(2) therefore seeks to create administrative efficiency by allowing the consistent treatment of place of use of the multiple water rights held by municipal water suppliers. This

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[37] CP 1558, 1485-86. Examples of rights held by public water systems with generally described places of use are included in the record 1558-59, 1621, 1623, 1667, 1669, 1639, 1504-06, 1520-33.

provision provides flexibility for municipal water suppliers in light of the simultaneous obligation of municipal suppliers to serve customers within their service boundaries. Plaintiffs have failed to satisfy their burden of proving their facial claim under the applicable exacting standards of review.

5. Sections 4(4) and (5), Concerning Connection and Population Numbers, Do Not Violate Substantive Due Process

Sections 4(4) and (5), RCW 90.03.260(4) and (5), confirm that the population figures and numbers of connections included in an application or other documents for municipal water rights are not limiting attributes. Plaintiffs' substantive due process claims are based on their misinterpretation of the law prior to the MWL, which, they contend, established population and connection numbers as limiting attributes. The amount of water that can be appropriated under a water right is set by quantity limitations. RCW 90.03.290. If the Legislature intended that Ecology limit the number of connections or the population that could be served, rather than the *quantity* of water rights that a water supplier could put to beneficial use, it would have referred to the "number of connections" or "population" rather than the "amount of water" in RCW 90.03.290.

Plaintiffs instead infer a limitation based on RCW 90.03.260, the

statutory provision governing contents of a complete application, as it existed prior to the MWL. Prior to the adoption of the MWL, RCW 90.03.260 required that an applicant for a right for municipal water supply give the present population and "as near as may be estimated, the future requirement of the municipality." The purpose of this section was not to define the limits of any particular water right, which is addressed at RCW 90.03.290, but to describe the information needed in an application for water rights so that Ecology can make an appropriate examination and decision. The Code's requirement to collect in an application a population estimate "as near as may be estimated" does not create a limiting attribute of a municipal water right. Plaintiffs are reading language into the statute as it existed prior to the MWL that was not there.

Without statutory authority or case law, the Tribes argue that a water right is limited to its "original intent" such that population figures or connection numbers included in an application are restrictive. In support of this proposition the Tribes cite to *In re Water Rights in Alpowa Creek,* 129 Wn. 9, 15, 224 P. 29 (1929) and *Merrill,* 137 Wn.2d 118. Neither supports plaintiffs' contention.

Alpowa Creek does not involve municipal water rights or even water rights created under Washington's water code. Instead, the case was an adjudication of water rights for irrigation of agricultural land,

created under the common law prior appropriation and riparian doctrines that existed prior to the Water Code of 1917. Thus, the *Alpowa* case is completely irrelevant to RCW 90.03.260, to municipal purpose water rights, and to the effect of population numbers or connections in application forms, forms that did not even exist under the common law prior appropriation and riparian doctrines. Moreover, *Alpowa* does not support Plaintiffs' novel original intent theory. While *Alpowa* recognized that a right is limited by time and volume, the Court rejected the parties' efforts to similarly limit purpose of use. *Alpowa*, 129 Wash. at 16; *Neubert*, 117 Wn.2d at 238. The Court should similarly reject Plaintiffs' invitation to extend the limitation on time and volume to other information submitted in an application.

Merrill is similarly inapposite and does not support Plaintiffs' argument that a water right is limited to its "original intent." In that case, the Court affirmed that season of use is a limiting factor of an irrigation water right. 137 Wn.2d 118, 128-29. However, there is not support for Plaintiffs more generalized contention that any information collected in a water right application is a limiting attribute.

At best, Plaintiffs have only an interest in an erroneous construction of prior law that is not afforded due process protections. To support their misinterpretation of past law, Plaintiffs seize on a dispute

between Ecology and Health regarding the very question of whether connection numbers in a permit or certificate were to be construed as limitations. While Ecology staff at one point concluded that the number of connections listed in a certificate could not be exceeded without a new water right application, Health disagreed. *See* CP1485, 1517-1518. This internal agency discrepancy was not resolved through policy or through litigation. *Id.* The Legislature appropriately used its police powers to resolve the ambiguity and confusion, and the effect of Sections 4(4) and (5) can be retroactive as a result without violating substantive or procedural due process.

Finally, the Tribes' substantive due process challenge also fails because Plaintiffs' allegations of harm are purely speculative that changes in population figures or numbers of connections will increase in consumptive use of water. Sections 4(4) and (5) do not change the quantity limitation in any water right. Thus, Plaintiffs' assumption that water use will increase beyond what is permitted in the right is unfounded. Their citation to *Schuh v. Dep't of Ecology,* 100 Wn. 2d 180, 186-87, 667 P.2d 64 (1983), in support of their proposition that increases in population figures or connection numbers will lead to increased consumptive use is perplexing. *Schuh* addressed a request to transfer an irrigation right whose quantity limitation was governed by a specific

restriction limiting the right to a specific quantity, less any water obtained from a federal irrigation project. *Id.* at 182. The question before the court was whether the amount transferred was impacted by the express quantity limitation in the permit. *Id.* at 186-87. The case is irrelevant to the question of the impact of population figures and connection numbers included in a permit application. Plaintiffs have failed to meet their burden of proving their facial claim under the applicable exacting standards of review.

D. Procedural Due Process.

WWUC incorporates the State's arguments in response to the Plaintiffs' procedural due process claims, in part IV.B of the State's Reply Brief.

E. Plaintiffs' Reliance on Discredited "As-Applied" Evidence Exposes the Fundamental Flaws of Their Case.

Because Plaintiffs cannot show that the MWL, on its face, impairs vested rights, they instead rely on speculative and conclusory allegations and discredited evidence[38] of the alleged application of the MWL. The

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[38] Burlingame misrepresents the factual record below when they contend that "WWUC does not challenge the accuracy of any of the illustrative exhibits" offered by the Plaintiffs. Burlingame Br. at 73. WWUC and the State presented rebuttal evidence demonstrating that Plaintiffs' as-applied evidence is speculative, inaccurate, unreliable and based on flawed assumptions and incorrect data. CP 2137-2207. WWUC's Opening Br. at 20. WWUC and the State offered the evidence to contest the veracity of Plaintiffs' evidence in the event the superior court admitted it. For example, Plaintiffs

superior court should have rejected Plaintiffs' reliance on "as-applied" evidence[39] as purported proof of their facial claims. More significantly, Plaintiffs' evidence and their use of it exposes their inability to show any injury to vested rights.

In their response, Plaintiffs ignore the case law cited by WWUC. Plaintiffs instead ask this Court to affirm the lower court's evidentiary ruling on two grounds, neither of which is compelling. First, Plaintiffs ask this court to affirm their reliance on discredited evidence because it was necessary to establish standing. But no party has challenged standing in this case. Plaintiffs' characterization of the purpose for which the evidence is offered is belied by Plaintiffs' reliance on that evidence to support their substantive arguments. *See* CP 1366-71, 1381, 1384-85, 1400-03, 1422; Tribes' Br. at 73; Burlingame's Br. at 12-13.

Similarly, Plaintiffs' characterization of the as-applied facts as "demonstrative" evidence is false. Demonstrative evidence is "concerned with real objects which illustrate some verbal testimony" and "may

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offered an expert report for the proposition that the MWL's place of use provision would harm stream flows. CP 718. WWUC submitted evidence that catalogued the false assumptions and errors of Plaintiffs' report. CP 2143-46, 2138-39. The rebuttal evidence is uncontroverted; Plaintiffs completely failed to respond. Plaintiffs nevertheless persist in relying on their discredited evidence.

[39] Plaintiffs are incorrect that WWUC did not specify which evidence was objectionable. As noted in WWUC's Opening Brief at 20, WWUC set out a complete list of Plaintiffs' as-applied evidence in WWUC's motion in limine. CP 2782

include maps, diagrams, photographs, models, charts..." BLACK'S, *supra* at 432. In this case, the contested evidence is testimony (through declarations) and alleged evidence of harm purportedly suffered due to the operation of the MWL. It was offered not to help the court understand the operation of the law; rather it was offered as purported proof of their substantive claims.

None of the three criminal cases cited by Burlingame supports their contention that the evidence is relevant.[40] None of them addresses facial constitutional challenges. *In re Woods*, 154 Wn. 2d 400, 426-27, 114 P.3d 607 (2005); *State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991); *State v. Gray*, 64 Wn.2d 979, 983, 395 P.2d 490 (1964). They addressed evidentiary questions in cases in which a material question of fact went to a jury or a judge. The Court should therefore reverse the superior court's decision to admit Plaintiffs' as-applied evidence.

Without their purported examples the Tribes are left with speculative, hypothetical allegations. This threshold evidentiary issue reveals the basic flaws in the Plaintiffs' case – the absence of any vested

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[40] Below, Plaintiffs principally relied on *City of Redmond v. Moore*, 151 Wn.2d 664, 672 n.2, 91 P.3d 875 (2004) to support their use of evidence in a facial challenge. Notably, in their brief to this Court, Plaintiffs no longer rely on *Moore* or their theory that their evidence are merely "illustrative examples." Plaintiffs concede that the case does not support their use of "as-applied" evidence in a facial challenge.

rights or deprivation. The Plaintiffs, therefore, have completely failed to sustain the allegations in their complaints that their "rights and interests" are "harmed" or impaired by the MWL. CP 1039, 600. The evidence they rely on is not relevant to a facial challenge and, even if it is, was discredited and rebutted.

IV. CONCLUSION

For the foregoing reasons, WWUC asks this Court to hold that sections 6(3), 1(3) and 1(4), do not facially violate separation of powers or substantive due process. Additionally WWUC requests that the Court affirm the superior court determination that sections 4(4), 4(5), and 5(2), do not facially violate substantive due process and that sections 3(2), 4(4), 4(5), and 5(2) do not facially violate procedural due process.

DATED this 23 day of February, 2009.

GORDONDERR LLP

By _____
Adam W. Gravley, WSBA #20343
Tadas Kisielius, WSBA #28734
Attorneys for Appellant, Washington Water Utilities Council (WWUC)

Appendix A

CERTIFICATION OF ENROLLMENT

SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338

58th Legislature
2003 1st Special Session

Passed by the House June 5, 2003
Yeas 83 Nays 14

Speaker of the House of Representatives

Passed by the Senate June 10, 2003
Yeas 33 Nays 11

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338 as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338

Passed Legislature - 2003 1st Special Session

State of Washington 58th Legislature 2003 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Linville, Kirby, Lantz, Rockefeller, Shabro, Jarrett, Grant, Quall, Hunt, Delvin, Wallace, Woods, Benson, Morris and Conway; by request of Governor Locke)

READ FIRST TIME 03/10/03.

AN ACT Relating to certainty and flexibility of municipal water rights and efficient use of water; amending RCW 90.03.015, 90.03.260, 90.03.386, 90.03.330, 90.48.495, 90.48.112, 90.46.120, and 70.119A.110; adding new sections to chapter 90.03 RCW; adding a new section to chapter 70.119A RCW; adding a new section to chapter 43.20 RCW; adding a new section to chapter 90.82 RCW; and adding a new section to chapter 90.54 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 90.03.015 and 1987 c 109 s 65 are each amended to read as follows:

((~~As used in this chapter:~~)) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of ecology((~~,~~)).

(2) "Director" means the director of ecology((~~, and~~)).

(3) "Municipal water supplier" means an entity that supplies water for municipal water supply purposes.

(4) "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of

water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. If a governmental entity holds a water right that is for the purposes listed in (a), (b), or (c) of this subsection, its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.

(5) "Person" means any firm, association, water users' association, corporation, irrigation district, or municipal corporation, as well as an individual.

NEW SECTION. **Sec. 2.** A new section is added to chapter 90.03 RCW to read as follows:

Beneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for:

(1) Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values; or

(2) Uses that are needed to implement environmental obligations called for by a watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, a federally approved habitat conservation plan prepared in response to the listing of a species as being endangered or threatened under the federal endangered species

act, 16 U.S.C. Sec. 1531 et seq., a hydropower license of the federal energy regulatory commission, or a comprehensive irrigation district management plan.

NEW SECTION. **Sec. 3.** A new section is added to chapter 90.03 RCW to read as follows:

When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes. This section authorizes a water right or portion of a water right held or acquired by a municipal water supplier that is for municipal water supply purposes as defined in RCW 90.03.015 to be identified as being a water right for municipal water supply purposes. However, it does not authorize any other water right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose.

Sec. 4. RCW 90.03.260 and 1987 c 109 s 84 are each amended to read as follows:

(1) Each application for permit to appropriate water shall set forth the name and post office address of the applicant, the source of water supply, the nature and amount of the proposed use, the time during which water will be required each year, the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use.

(2) If for agricultural purposes, ((~~it~~)) the application shall give the legal subdivision of the land and the acreage to be irrigated, as near as may be, and the amount of water expressed in acre feet to be supplied per season. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied.

(3) If for construction of a reservoir, ((~~it~~)) the application

shall give the height of the dam, the capacity of the reservoir, and the uses to be made of the impounded waters.

(4) If for community or multiple domestic water supply, the application shall give the projected number of service connections sought to be served. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the service connection figure in the application or any subsequent water right document is not an attribute limiting exercise of the water right as long as the number of service connections to be served under the right is consistent with the approved water system plan or specified number.

(5) If for municipal water supply, ((~~it~~)) the application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the population figures in the application or any subsequent water right document are not an attribute limiting exercise of the water right as long as the population to be provided water under the right is consistent with the approved water system plan or specified number.

(6) If for mining purposes, ((~~it~~)) the application shall give the nature of the mines to be served and the method of supplying and utilizing the water; also their location by legal subdivisions.

(7) All applications shall be accompanied by such maps and drawings, in duplicate, and such other data, as may be required by the department, and such accompanying data shall be considered as a part of the application.

Sec. 5. RCW 90.03.386 and 1991 c 350 s 2 are each amended to read as follows:

(1) Within service areas established pursuant to chapter((~~s~~)) 43.20 ((~~and~~)) or 70.116 RCW, the department of ecology and the department of health shall coordinate approval procedures to ensure compliance and consistency with the approved water system plan or small water system management program.

(2) The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or ground water right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right if the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, if such a watershed plan has been approved for the area.

(3) A municipal water supplier must implement cost-effective water conservation in accordance with the requirements of section 7 of this act as part of its approved water system plan or small water system management program. In preparing its regular water system plan update, a municipal water supplier with one thousand or more service connections must describe: (a) The projects, technologies, and other cost-effective measures that comprise its water conservation program; (b) improvements in the efficiency of water system use resulting from implementation of its conservation program over the previous six years; and (c) projected effects of delaying the use of existing inchoate rights over the next six years through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use. When establishing or extending a surface or ground water right construction schedule under RCW 90.03.320, the department must take into consideration the public water system's use of conserved water.

Sec. 6. RCW 90.03.330 and 1987 c 109 s 89 are each amended to read as follows:

(1) Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of the department to issue to the applicant a certificate stating such facts in a form to be prescribed by ((~~him~~)) the director, and such certificate shall thereupon be recorded with the department. Any original water right certificate issued, as provided by this chapter, shall be recorded with the department and thereafter, at the expense of the party receiving the same, be transmitted by the department ((~~transmitted~~)) to the county auditor of the county or counties where the distributing system or any part thereof is located, and be recorded in the office of such county auditor, and thereafter be transmitted to the owner thereof.

(2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation. The department may adjust such a certificate under this subsection if ministerial errors are discovered, but only to the extent necessary to correct the ministerial errors. The department may diminish the right represented by such a certificate if the certificate was obtained through a misrepresentation on the part of the applicant or permit holder, but only to the extent of the misrepresentation. The authority provided by this subsection does not include revoking, diminishing, or adjusting a certificate based on any change in policy regarding the issuance of such certificates that has occurred since the certificate was issued. This subsection may not be construed as providing any authority to the department to revoke, diminish, or adjust any other water right.

(3) This subsection applies to the water right represented by a water right certificate issued prior to the effective date of this section for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

(4) After the effective date of this section, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water.

NEW SECTION. **Sec. 7.** A new section is added to chapter 70.119A RCW to read as follows:

(1) It is the intent of the legislature that the department establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.

(2) The requirements of this section shall apply to all municipal water suppliers and shall be tailored to be appropriate to system size, forecasted system demand, and system supply characteristics.

(3) For the purposes of this section:

(a) Water use efficiency includes conservation planning requirements, water distribution system leakage standards, and water conservation performance reporting requirements; and

(b) "Municipal water supplier" and "municipal water supply purposes" have the meanings provided by RCW 90.03.015.

(4) To accomplish the purposes of this section, the department shall adopt rules necessary to implement this section by December 31, 2005. The department shall:

(a) Develop conservation planning requirements that ensure municipal water suppliers are: (i) Implementing programs to integrate conservation with water system operation and management; and (ii) identifying how to appropriately fund and implement conservation activities. Requirements shall apply to the conservation element of water system plans and small water system management programs developed pursuant to chapter 43.20 RCW. In establishing the conservation planning requirements the department shall review the current department conservation planning guidelines and include those elements that are appropriate for rule. Conservation planning requirements shall include but not be limited to:

(A) Selection of cost-effective measures to achieve a system's

water conservation objectives. Requirements shall allow the municipal water supplier to select and schedule implementation of the best methods for achieving its conservation objectives;

(B) Evaluation of the feasibility of adopting and implementing water delivery rate structures that encourage water conservation;

(C) Evaluation of each system's water distribution system leakage and, if necessary, identification of steps necessary for achieving water distribution system leakage standards developed under (b) of this subsection;

(D) Collection and reporting of water consumption and source production and/or water purchase data. Data collection and reporting requirements shall be sufficient to identify water use patterns among utility customer classes, where applicable, and evaluate the effectiveness of each system's conservation program. Requirements, including reporting frequency, shall be appropriate to system size and complexity. Reports shall be available to the public; and

(E) Establishment of minimum requirements for water demand forecast methodologies such that demand forecasts prepared by municipal water suppliers are sufficient for use in determining reasonably anticipated future water needs;

(b) Develop water distribution system leakage standards to ensure that municipal water suppliers are taking appropriate steps to reduce water system leakage rates or are maintaining their water distribution systems in a condition that results in leakage rates in compliance with the standards. Limits shall be developed in terms of percentage of total water produced and/or purchased and shall not be lower than ten percent. The department may consider alternatives to the percentage of total water supplied where alternatives provide a better evaluation of the water system's leakage performance. The department shall institute a graduated system of requirements based on levels of water system leakage. A municipal water supplier shall select one or more control methods appropriate for addressing leakage in its water system;

(c) Establish minimum requirements for water conservation performance reporting to assure that municipal water suppliers are regularly evaluating and reporting their water conservation performance. The objective of setting conservation goals is to enhance the efficient use of water by the water system customers. Performance reporting shall include:

(i) Requirements that municipal water suppliers adopt and achieve water conservation goals. The elected governing board or governing body of the water system shall set water conservation goals for the system. In setting water conservation goals the water supplier may consider historic conservation performance and conservation investment, customer base demographics, regional climate variations, forecasted demand and system supply characteristics, system financial viability, system reliability, and affordability of water rates. Conservation goals shall be established by the municipal water supplier in an open public forum;

(ii) Requirements that the municipal water supplier adopt schedules for implementing conservation program elements and achieving conservation goals to ensure that progress is being made toward adopted conservation goals;

(iii) A reporting system for regular reviews of conservation performance against adopted goals. Performance reports shall be available to customers and the public. Requirements, including reporting frequency, shall be appropriate to system size and complexity;

(iv) Requirements that any system not meeting its water conservation goals shall develop a plan for modifying its conservation program to achieve its goals along with procedures for reporting performance to the department;

(v) If a municipal water supplier determines that further reductions in consumption are not reasonably achievable, it shall identify how current consumption levels will be maintained;

(d) Adopt rules that, to the maximum extent practical, utilize existing mechanisms and simplified procedures in order to minimize the cost and complexity of implementation and to avoid placing unreasonable financial burden on smaller municipal systems.

(5) The department shall establish an advisory committee to assist the department in developing rules for water use efficiency. The advisory committee shall include representatives from public water system customers, environmental interest groups, business interest groups, a representative cross-section of municipal water suppliers, a water utility conservation professional, tribal governments, the department of ecology, and any other members determined necessary by the department. The department may use the water supply advisory

committee created pursuant to RCW 70.119A.160 augmented with additional participants as necessary to comply with this subsection to assist the department in developing rules.

(6) The department shall provide technical assistance upon request to municipal water suppliers and local governments regarding water conservation, which may include development of best management practices for water conservation programs, conservation landscape ordinances, conservation rate structures for public water systems, and general public education programs on water conservation.

(7) To ensure compliance with this section, the department shall establish a compliance process that incorporates a graduated approach employing the full range of compliance mechanisms available to the department.

(8) Prior to completion of rule making required in subsection (4) of this section, municipal water suppliers shall continue to meet the existing conservation requirements of the department and shall continue to implement their current water conservation programs.

NEW SECTION. **Sec. 8.** A new section is added to chapter 43.20 RCW to read as follows:

In approving the water system plan of a public water system, the department shall ensure that water service to be provided by the system under the plan for any new industrial, commercial, or residential use is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 36.70A RCW or any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county for the service area. A municipal water supplier, as defined in RCW 90.03.015, has a duty to provide retail water service within its retail service area if: (1) Its service can be available in a timely and reasonable manner; (2) the municipal water supplier has sufficient water rights to provide the service; (3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health; and (4) it is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 36.70A RCW or any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county for

the service area and, for water service by the water utility of a city or town, with the utility service extension ordinances of the city or town.

NEW SECTION. **Sec. 9.** A new section is added to chapter 90.82 RCW to read as follows:

(1) The timelines and interim milestones in a detailed implementation plan required by section 3, chapter . . . (Engrossed Second Substitute House Bill No. 1336), Laws of 2003 must address the planned future use of existing water rights for municipal water supply purposes, as defined in RCW 90.03.015, that are inchoate, including how these rights will be used to meet the projected future needs identified in the watershed plan, and how the use of these rights will be addressed when implementing instream flow strategies identified in the watershed plan.

(2) The watershed planning unit or other authorized lead agency shall ensure that holders of water rights for municipal water supply purposes not currently in use are asked to participate in defining the timelines and interim milestones to be included in the detailed implementation plan.

(3) The department of health shall annually compile a list of water system plans and plan updates to be reviewed by the department during the coming year and shall consult with the departments of community, trade, and economic development, ecology, and fish and wildlife to: (a) Identify watersheds where further coordination is needed between water system planning and local watershed planning under this chapter; and (b) develop a work plan for conducting the necessary coordination.

NEW SECTION. **Sec. 10.** A new section is added to chapter 90.54 RCW to read as follows:

The department shall prioritize the expenditure of funds and other resources for programs related to streamflow restoration in watersheds where the exercise of inchoate water rights may have a larger effect on streamflows and other water uses.

Sec. 11. RCW 90.48.495 and 1989 c 348 s 10 are each amended to read as follows:

The department of ecology shall require sewer plans to include a

discussion of water conservation measures considered or underway that would reduce flows to the sewerage system and an analysis of their anticipated impact on public sewer service and treatment capacity.

Sec. 12. RCW 90.48.112 and 1997 c 444 s 9 are each amended to read as follows:

The evaluation of any plans submitted under RCW 90.48.110 must include consideration of opportunities for the use of reclaimed water as defined in RCW 90.46.010. Wastewater plans submitted under RCW 90.48.110 must include a statement describing how applicable reclamation and reuse elements will be coordinated as required under RCW 90.46.120(2).

Sec. 13. RCW 90.46.120 and 1997 c 444 s 1 are each amended to read as follows:

(1) The owner of a wastewater treatment facility that is reclaiming water with a permit issued under this chapter has the exclusive right to any reclaimed water generated by the wastewater treatment facility. Use and distribution of the reclaimed water by the owner of the wastewater treatment facility is exempt from the permit requirements of RCW 90.03.250 and 90.44.060. Revenues derived from the reclaimed water facility shall be used only to offset the cost of operation of the wastewater utility fund or other applicable source of system-wide funding.

(2) If the proposed use or uses of reclaimed water are intended to augment or replace potable water supplies or create the potential for the development of additional potable water supplies, such use or uses shall be considered in the development of the regional water supply plan or plans addressing potable water supply service by multiple water purveyors. The owner of a wastewater treatment facility that proposes to reclaim water shall be included as a participant in the development of such regional water supply plan or plans.

(3) Where opportunities for the use of reclaimed water exist within the period of time addressed by a water supply plan or coordinated water system plan developed under chapter 43.20 or 70.116 RCW, these plans must be developed and coordinated to ensure that opportunities for reclaimed water are evaluated. The requirements of this subsection

(3) do not apply to water system plans developed under chapter 43.20 RCW for utilities serving less than one thousand service connections.

NEW SECTION. **Sec. 14.** A new section is added to chapter 90.03 RCW to read as follows:

(1) An unperfected surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may be changed or transferred in the same manner as provided by RCW 90.03.380 for any purpose if:

(a) The supplier is in compliance with the terms of an approved water system plan or small water system management program under chapter 43.20 or 70.116 RCW that applies to the supplier, including those regarding water conservation;

(b) Instream flows have been established by rule for the water resource inventory area, as established in chapter 173-500 WAC as it exists on the effective date of this section, that is the source of the water for the transfer or change;

(c) A watershed plan has been approved for the water resource inventory area referred to in (b) of this subsection under chapter 90.82 RCW and a detailed implementation plan has been completed that satisfies the requirements of section 3, chapter . . ., Laws of 2003 (section 3, Engrossed Second Substitute House Bill No. 1336) or a watershed plan has been adopted after the effective date of this section for that water resource inventory area under RCW 90.54.040(1) and a detailed implementation plan has been completed that satisfies the requirements of section 3, chapter . . ., Laws of 2003 (section 3, Engrossed Second Substitute House Bill No. 1336); and

(d) Stream flows that satisfy the instream flows referred to in (b) of this subsection are met or the milestones for satisfying those instream flows required under (c) of this subsection are being met.

(2) If the criteria listed in subsection (1)(a) through (d) of this section are not satisfied, an unperfected surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may nonetheless be changed or transferred in the same manner as provided by RCW 90.03.380 if the change or transfer is:

(a) To provide water for an instream flow requirement that has been established by the department by rule;

(b) Subject to stream flow protection or restoration requirements contained in: A federally approved habitat conservation plan under the federal endangered species act, 16 U.S.C. Sec. 1531 et seq., a hydropower license of the federal energy regulatory commission, or a watershed agreement established under section 16 of this act;

(c) For a water right that is subject to instream flow requirements or agreements with the department and the change or transfer is also subject to those instream flow requirements or agreements; or

(d) For resolving or alleviating a public health or safety emergency caused by a failing public water supply system currently providing potable water to existing users, as such a system is described in section 15 of this act, and if the change, transfer, or amendment is for correcting the actual or anticipated cause or causes of the public water system failure. Inadequate water rights for a public water system to serve existing hookups or to accommodate future population growth or other future uses do not constitute a public health or safety emergency.

(3) If the recipient of water under a change or transfer authorized by subsection (1) of this section is a water supply system, the receiving system must also be in compliance with the terms of an approved water system plan or small water system management program under chapter 43.20 or 70.116 RCW that applies to the system, including those regarding water conservation.

(4) The department must provide notice to affected tribes of any transfer or change proposed under this section.

NEW SECTION. **Sec. 15.** A new section is added to chapter 90.03 RCW to read as follows:

To be considered a failing public water system for the purposes of section 14 of this act, the department of health, in consultation with the department and the local health authority, must make a determination that the system meets one or more of the following conditions:

(1) A public water system has failed, or is in danger of failing within two years, to meet state board of health standards for the delivery of potable water to existing users in adequate quantity or quality to meet basic human drinking, cooking, and sanitation needs or to provide adequate fire protection flows;

(2) The current water source has failed or will fail so that the public water system is or will become incapable of exercising its existing water rights to meet existing needs for drinking, cooking, and sanitation purposes after all reasonable conservation efforts have been implemented; or

(3) A change in source is required to meet drinking water quality standards and avoid unreasonable treatment costs, or the state department of health determines that the existing source of supply is unacceptable for human use.

NEW SECTION. **Sec. 16.** A new section is added to chapter 90.03 RCW to read as follows:

(1) On a pilot project basis, the department may enter into a watershed agreement with one or more municipal water suppliers in water resource inventory area number one to meet the objectives established in a water resource management program approved or being developed under chapter 90.82 RCW with the consent of the initiating governments of the water resource inventory area. The term of an agreement may not exceed ten years, but the agreement may be renewed or amended upon agreement of the parties.

(2) A watershed agreement must be consistent with:

(a) Growth management plans developed under chapter 36.70A RCW where these plans are adopted and in effect;

(b) Water supply plans and small water system management programs approved under chapter 43.20 or 70.116 RCW;

(c) Coordinated water supply plans approved under chapter 70.116 RCW; and

(d) Water use efficiency and conservation requirements and standards established by the state department of health or such requirements and standards as are provided in an approved watershed plan, whichever are the more stringent.

(3) A watershed agreement must:

(a) Require the public water system operated by the participating municipal water supplier to meet obligations under the watershed plan;

(b) Establish performance measures and timelines for measures to be completed;

(c) Provide for monitoring of stream flows and metering of water use as needed to ensure that the terms of the agreement are met; and

(d) Require annual reports from the water users regarding performance under the agreement.

(4) As needed to implement watershed agreement activities, the department may provide or receive funding, or both, under its existing authorities.

(5) The department must provide opportunity for public review of a proposed agreement before it is executed. The department must make proposed and executed watershed agreements and annual reports available on the department's internet web site.

(6) The department must consult with affected local governments and the state departments of health and fish and wildlife before executing an agreement.

(7) Before executing a watershed agreement, the department must conduct a government-to-government consultation with affected tribal governments. The municipal water suppliers operating the public water systems that are proposing to enter into the agreements must be invited to participate in the consultations. During these consultations, the department and the municipal water suppliers shall explore the potential interest of the tribal governments or governments in participating in the agreement.

(8) Any person aggrieved by the department's failure to satisfy the requirements in subsection (3) of this section as embodied in the department's decision to enter into a watershed agreement under this section may, within thirty days of the execution of such an agreement, appeal the department's decision to the pollution control hearings board under chapter 43.21B RCW.

(9) Any projects implemented by a municipal water system under the terms of an agreement reached under this section may be continued and maintained by the municipal water system after the agreement expires or is terminated as long as the conditions of the agreement under which they were implemented continue to be met.

(10) Before December 31, 2003, and December 31, 2004, the department must report to the appropriate committees of the legislature the results of the pilot project provided for in this section. Based on the experience of the pilot project, the department must offer any suggested changes in law that would improve, facilitate, and maximize the implementation of watershed plans adopted under this chapter.

NEW SECTION. **Sec. 17.** A new section is added to chapter 90.03 RCW to read as follows:

The department may not enter into new watershed agreements under section 16 of this act after July 1, 2008. This section does not apply to the renewal of agreements in effect prior to that date.

Sec. 18. RCW 70.119A.110 and 1991 c 304 s 5 are each amended to read as follows:

(1) No person may operate a group A public water system unless the person first submits an application to the department and receives an operating permit as provided in this section. A new application must be submitted upon any change in ownership of the system. Any person operating a public water system on July 28, 1991, may continue to operate the system until the department takes final action, including any time necessary for a hearing under subsection (3) of this section, on a permit application submitted by the person operating the system under the rules adopted by the department to implement this section.

(2) The department may require that each application include the information that is reasonable and necessary to determine that the system complies with applicable standards and requirements of the federal safe drinking water act, state law, and rules adopted by the department or by the state board of health.

(3) Following its review of the application, its supporting material, and any information received by the department in its investigation of the application, the department shall issue or deny the operating permit. The department shall act on initial permit applications as expeditiously as possible, and shall in all cases either grant or deny the application within one hundred twenty days of receipt of the application or of any supplemental information required to complete the application. The applicant for a permit shall be entitled to file an appeal in accordance with chapter 34.05 RCW if the department denies the initial or subsequent applications or imposes conditions or requirements upon the operator. Any operator of a public water system that requests a hearing may continue to operate the system until a decision is issued after the hearing.

(4) At the time of initial permit application or at the time of permit renewal the department may impose such permit conditions,

requirements for system improvements, and compliance schedules as it determines are reasonable and necessary to ensure that the system will provide a safe and reliable water supply to its users.

(5) Operating permits shall be issued for a term of one year, and shall be renewed annually, unless the operator fails to apply for a new permit or the department finds good cause to deny the application for renewal.

(6) Each application shall be accompanied by an annual fee as follows:

(a) The annual fee for public water supply systems serving fifteen to forty-nine service connections shall be twenty-five dollars.

(b) The annual fee for public water supply systems serving fifty to three thousand three hundred thirty-three service connections shall be based on a uniform per service connection fee of one dollar and fifty cents per service connection.

(c) The annual fee for public water supply systems serving three thousand three hundred thirty-four to fifty-three thousand three hundred thirty-three service connections shall be based on a uniform per service connection fee of one dollar and fifty cents per service connection plus ten cents for each service connection in excess of three thousand three hundred thirty-three service connections.

(d) The annual fee for public water supply systems serving fifty-three thousand three hundred thirty-four or more service connections shall be ten thousand dollars.

(e) In addition to the fees under (a) through (d) of this subsection, the department may charge an additional one-time fee of five dollars for each service connection in a new water system.

(f) Until June 30, 2007, in addition to the fees under (a) through (e) of this subsection, the department may charge municipal water suppliers, as defined in RCW 90.03.015, an additional annual fee equivalent to twenty-five cents for each residential service connection for the purpose of funding the water conservation activities in section 7 of this act.

(7) The department may phase-in the implementation for any group of systems provided the schedule for implementation is established by rule. Prior to implementing the operating permit requirement on water systems having less than five hundred service connections, the department shall form a committee composed of persons operating these

systems. The committee shall be composed of the department of health, two operators of water systems having under one hundred connections, two operators of water systems having between one hundred and two hundred service connections, two operators of water systems having between two hundred and three hundred service connections, two operators of water systems having between three hundred and four hundred service connections, two operators of water systems having between four hundred and five hundred service connections, and two county public health officials. The members shall be chosen from different geographic regions of the state. This committee shall develop draft rules to implement this section. The draft rules will then be subject to the rule-making procedures in accordance with chapter 34.05 RCW.

(8) The department shall notify existing public water systems of the requirements of RCW 70.119A.030, 70.119A.060, and this section at least one hundred twenty days prior to the date that an application for a permit is required pursuant to RCW 70.119A.030, 70.119A.060, and this section.

(9) The department shall issue one operating permit to any approved satellite system management agency. Operating permit fees for approved satellite system management agencies shall be one dollar per connection per year for the total number of connections under the management of the approved satellite agency. The department shall define by rule the meaning of the term "satellite system management agency." If a statutory definition of this term exists, then the department shall adopt by rule a definition consistent with the statutory definition.

(10) For purposes of this section, "group A public water system" and "system" mean those water systems with fifteen or more service connections, regardless of the number of people; or a system serving an average of twenty-five or more people per day for sixty or more days within a calendar year, regardless of the number of service connections.

NEW SECTION. **Sec. 19.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other

persons or circumstances is not affected.

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Appendix B

Arizona A.R.S. § 45-561 provides the following definition:

(10) "Municipal provider" means a city, town, private water company or irrigation district that supplies water for non-irrigation use.

(11) "Municipal use" means all non-irrigation uses of water supplied by a city, town, private water company or irrigation district, except for uses of water, other than Colorado river water, released for beneficial use from storage, diversion or distribution facilities to avoid spilling that would otherwise occur due to uncontrolled surface water inflows that exceed facility capacity.

Idaho Code § 42-202B (2008) provides the following definition:

Whenever used in this title, the term:

(4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

(5) "Municipal provider" means:

(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;

(b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or

(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 39-103 (2008), provides the following definition:

(12) "Public water supply" means all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where ten (10) or more separate premises or households are being served or intended to be served; or any other supply which serves water to the public and which the department declares to have potential health significance.

Utah Code Ann. § 73-1-4 (2008) provides the following definition:

(1) As used in this section:

(a) "Public entity" means:

(i) the United States;

(ii) an agency of the United States;

(iii) the state;

(iv) a state agency;

(v) a political subdivision of the state; or

(vi) an agency of a political subdivision of the state.

(b) "Public water supplier" means an entity that:

(i) supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use; and

(ii) is:

(A) a public entity;

(B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public Service Commission;

(C) a community water system:

(I) that:

(Aa) supplies water to at least 100 service connections used by year-round residents; or

(Bb) regularly serves at least 200 year-round residents; and

(II) whose voting members:

(Aa) own a share in the community water system;

(Bb) receive water from the community water system in proportion to the member's share in the community water system; and

(Cc) pay the rate set by the community water system based on the water the member receives; or

(D) a water users association:

(I) in which one or more public entities own at least 70% of the outstanding shares; and

(II) that is a local sponsor of a water project constructed by the United States Bureau of Reclamation.